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77-1286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

PEOPLE OF THE CITY OF EAST DETROIT,
Petitioner,

v.

JAMES D. LLEWELLYN AND LAS VEGAS CINEMA, INC.,
Respondents.

PEOPLE OF THE CITY OF EAST DETROIT,
Petitioner,

v.

ROBERT L. VICKERY, GALEN ODELL BRAYBOY,
and WILLIAM LININGTON,
Respondents.

CAPRI THEATRE COMPANY, INC., a Michigan Corporation,
Respondent,

v.

CITY OF EAST DETROIT, a Michigan Municipal Corporation,
MAYOR OF THE CITY OF EAST DETROIT, and
CHIEF OF POLICE OF THE CITY OF EAST DETROIT,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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TO: THE HONORABLE WARREN BURGER, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

People of the City of East Detroit, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgments of the Supreme Court of the State of Michigan entered in the above entitled cases:

A. People of the City of East Detroit v. James D. Llewellyn and Las Vegas Cinema, Opinion issued on October 6, 1977, Application for Rehearing denied on the 15th day of December, 1977;

B. People of the City of East Detroit v. Robert L. Vickery, Galen Odell Brayboy and William Linington, Order entered on October 27, 1977, Application for Rehearing denied on the 29th day of December, 1977;

C. Capri Theatre Company, Inc., a Michigan Corporation v. City of East Detroit, a Michigan Municipal Corporation, Mayor of the City of East Detroit and Chief of Police of the City of East Detroit, entered on October 27, 1977, Motion for Rehearing denied on the 29th day of December, 1977.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Michigan in People of the City of East Detroit v. James D. Llewellyn and Las Vegas Cinema, Inc. is reported at

401 Mich 314, 257 NW2d 902, and is printed in Appendix A hereto, infra, page 30. The Order of the Supreme Court for the State of Michigan denying Petitioner's Application for Rehearing is reported at 402 Mich 954, 257 NW2d _____, and is printed in Appendix A hereto, infra, page 55.

The Order of the Supreme Court of the State of Michigan in the case of People of the City of East Detroit v. Robert L. Vickery, Galen Odell Brayboy and William Linington is reported at 401 Mich 843, 257 NW2d _____, and a copy of the Order is printed in Appendix A hereto, infra, page 56. The Order of the Supreme Court for the State of Michigan denying Petitioners Application for Rehearing is not reported, and a copy of the Order is printed in Appendix A hereto, infra, page 58. The Opinion of the Michigan Court of Appeals is reported at 69 Mich App 183, 244 NW2d 404 (1976), and a copy of the Opinion is printed in Appendix A hereto, infra, page 60.

The Order of the Supreme Court of the State of Michigan in Capri Theatre Company, Inc., a Michigan Corporation v. The City of East Detroit, a Michigan Municipal Corporation, Mayor of the City of East Detroit, and Chief of Police of the City of East Detroit is reported at 401 Mich 843, _____ NW2d _____, and is printed in Appendix A hereto, infra, page 76. The Order of the Supreme Court for the State of Michigan denying Petitioner's Application for Rehearing is printed at 402 Mich 954, _____ NW2d _____, and a copy of the Order is printed in Appendix A hereto, infra, page 78. The Order of the Michigan Court of Appeals dismissing Petitioner's Appeal is reported at 69 Mich App 183, _____ NW2d _____, and a copy of the Order is printed in Appendix A hereto, infra, page 80.

JURISDICTION

A. The Opinion of the Supreme Court of the State of Michigan in People of the City of East Detroit v. James D. Llewellyn and Las Vegas Cinema, Inc. (Appendix A, infra, page 30) was entered on the 6th day of October, 1977.

B. The timely Petition for Rehearing was denied on the 15th day of December, 1977 (Appendix A, infra, page 55).

C. The jurisdiction of the Court is invoked pursuant to 28 USCS §1257(3). (The validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes, or commission held or authority exercised under the United States.) Further, jurisdiction is invoked pursuant to Rule 19 of the Rules of the United States Supreme Court §1(a), where a state court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way not in accord with applicable decisions of this Court.

D. The Petitioners assert this Court has jurisdiction in this matter for the following reasons:

1. The decision of the Supreme Court of the State of Michigan is a final judgment in that it reverses the convictions of Respondents and prohibits Petitioner from further enforcement of its obscenity ordinance, and exhausts both parties remedies pursuant to state law.

2. The decision of the Supreme Court of the State of Michigan affects the rights of Petitioner and the citizens of the City of East Detroit in that it affects and denies rights which are protected by the First Amendment of the United States Constitution as applicable to the states through the Fourteenth Amendment, as interpreted and applied by this Court in *Miller v. California*, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607 (1973).

3. The Supreme Court of the State of Michigan has reversed the convictions of Respondents herein, and determined that the People of the City of East Detroit may not enact a municipal ordinance which regulates obscenity contrary to this Court's interpretation and application of the First and Fourteenth Amendments of the United States Constitution in *Miller v. California*, supra.

E. Petitioners request pursuant to the United States Supreme Court Rule 23(5) that these cases be reviewed pursuant to a single Petition for Writ of Certiorari for the reason that they involve identical issues, People of the City of East Detroit v. Robert L. Vickery, Galen Odell Brayboy and William Linington, and Capri Theatre Company, Inc., a Michigan Corporation v. City of East Detroit, a Michigan Municipal Corporation, Mayor of the City of East Detroit and Chief of Police of the City of East Detroit, having been held in abeyance pending the decision of the Supreme Court of the State of Michigan in People v. James D. Llewellyn and Las Vegas Cinema, Inc. Copies of the respective Orders are printed in Appendix A hereto, infra, pages 82 and 84.

QUESTION PRESENTED

DOES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, AS MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT AND AS CONSTRUED BY THIS COURT IN *MILLER v. CALIFORNIA*, SUPRA, GRANT AND GUARANTEE A LOCAL MUNICIPALITY THE RIGHT TO REGULATE OBSCENE MATERIAL?

The Supreme Court of the State of Michigan holds no.

Petitioners maintain yes.

Respondents maintain no.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES

A. First Amendment of the United States Constitution.

B. Fourteenth Amendment of the United States Constitution.

C. MCLA 750.343(a) through (e) (the State of Michigan obscenity statute), printed in Appendix A, hereto, infra, page 86.

D. City of East Detroit Obscenity Ordinance, Chapter 129 of Title IX of said Code at Sections 9.301, 9.302, 9.303, 9.305 and 9.309, as amended, printed in Appendix A hereto, infra, page 90.

STATEMENT OF FACTS

The Constitution of the State of Michigan, at Article VII, §22, (Constitution 1963), contains the following grant of powers:

> "Under the general laws, electors of each city and village will have the power and authority to frame, adopt and amend its Charter, and to amend existing Charters of the city or village heretofore granted or enacted by the Legislature for the government of the city or village. Each such city or village shall have the power to adopt resolutions and ordinances relating to its municipal concerns, property and government subject to the Constitution and law. No enumeration of powers granted to cities and villages in this Constitution shall limit or restrict the general grant of authority conferred by this section."

Michigan Statutes Annotated, §5.2082, Permissible Charter Provisions, §9, Regulations and Enforcement, provides that:

> "Each city may provide for the enforcement of all such local, police, sanitary and other regulations as are not in conflict with the general laws."

Pursuant to the above authority, the City of East Detroit adopted on the 7th day of January, 1929 the City Charter, which was revised on the 1st day of May, 1965. Chapter II of said Charter, entitled Powers, at §1, provides:

> "The said City, as such, shall have perpetual succession; may define, prohibit, abate, suppress, regulate or prevent all things detrimental to the

> health, morals, comfort, safety, convenience and welfare of the inhabitants of the City, and all nuisances and causes thereof; . . . may exercise all powers which now and hereafter would be competent for this Charter to enumerate as fully and completely as though said powers were specifically enumerated herein; and no enumeration of particular powers by this Charter shall be held as exclusive or in any way as a limitation on said City to legislate on other subjects, and all such powers, whether express or implied, shall be exercised and enforced in the manner as shall be provided by Ordinance, Resolution, or in the general laws of the State."

On the 29th day of April, 1975, the Supreme Court of the State of Michigan issued its Opinion in the case of *People v. Bloss*, 394 Mich 79, 328 NW2d 384. The United States Supreme Court had vacated an earlier Judgment in *People v. Bloss*, 338 Mich 409, 201 NW2d 806 (1972), and remanded *Bloss* to the State of Michigan Supreme Court for further consideration in light of the *Miller* cases. The Michigan Supreme Court issued the following short Opinion in *Bloss*, supra:

> "We are persuaded that Defendant's conviction cannot stand for the reason that at the time he did the act complained of, this Court had not construed the obscenity statute (as permitted in *Miller*) to proscribe such conduct.
>
> We are unanimously of the opinion that the Michigan Statutes regulating the dissemination of 'obscene' material as applied to juveniles and unconsenting adults are valid and enforceable.

> We are divided as to whether such statutes can properly be construed by us without further legislative expression as proscribing the dissemination of 'obscene' material to consenting adults. See Constitution 1963, Article I, Section Five. The conviction is reversed and the Defendant is discharged."

On June 21, 1973, the date that this Honorable Court issued its Opinion in *Miller v. California*, supra, it was immediately apparent to the City of East Detroit that the State of Michigan statute regulating obscenity and the City of East Detroit ordinance presently in effect did not meet the standards and requirements set forth in *Miller v. California*, pursuant to the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment. On the 25th day of February, 1974, the City of East Detroit adopted Ordinance No. 515, which amended Sections 9.301, 9.302, 9.303, 9.305 and 9.309, as printed in Appendix A hereto, infra, page 90. The reason that the City of East Detroit acted to amend its own obscenity ordinance was that two adult-type motion picture theatres had recently commenced showing hard core adult films, and it was apparent that the State of Michigan obscenity statute would not meet the requirements of *Miller*.

On March 4, 1974, Respondents James D. Llewellyn and the Las Vegas Cinema, Inc., a foreign Corporation, were charged with exhibiting two obscene motion pictures at a theatre in the City of East Detroit. The two motion pictures in question were seized from the theatre pursuant to a search warrant issued by a Magistrate of the Municipal Court of the City of East Detroit, which warrant issued upon the Affidavit of a

police officer. The search warrant, affidavit in support thereof, and return of the warrant appear in the Appendix at pages 96, 98, and 101 respectively.

Respondents were tried before a jury in the Municipal Court of the City of East Detroit and were found guilty of showing the motion picture film Deep Throat in violation of the East Detroit anti-obscenity Ordinance, as amended on February 25, 1974.

Respondents filed trial de novo to the Circuit Court for the County of Macomb, and the case was assigned to the Honorable Walter P. Cynar.

On September 25, 1974, Respondents filed a Motion to Dismiss supported by a Memorandum of Law, raising the following issues:

1. That the provisions of the Ordinance are void for vagueness and/or overbreadth in that they violate the provisions of the First and Fourteenth Amendments to the United States Constitution;

2. That an obscenity prosecution under City Ordinance absent any definitive guidelines from the highest court of the State or from the State Legislature as to the definition of and/or the standards to be applied in any obscenity prosecution, violate the due process clause of the Fourteenth Amendment to the United States Constitution;

3. That the provisions of the Ordinance are void as violative of Article VII §22 of the Michigan Constitution (1963) in that the Ordinance, as written and/or as applied, prohibits that which is permitted by State statute;

4. That the criminal warrants and complaints were fatally defective in that they failed to allege an essential

element of the offense charged — scienter or guilty knowledge.

On October 4, 1974, the Honorable Walter P. Cynar denied Defendant's Motion. Trial was scheduled to commence on October 8, 1974, and on that day Respondents renewed their Motion to Dismiss on the grounds previously raised and on the additional ground that the motion picture films at issue were unlawfully seized pursuant to a search warrant lacking a sufficient Affidavit in Support thereof, in violation of the State and Federal constitutional guarantees of freedom of expression and against unreasonable searches and seizures. Judge Cynar again denied the Motions and trial commenced. On October 11, 1974, the jury, after viewing the motion picture Deep Throat in its entirety, returned a verdict of guilty as to both Respondents. On October 16, 1974, sentence was imposed.

Respondents filed an Application for Leave to Appeal in the Court of Appeals for the State of Michigan, which was denied on March 20, 1975. Said Application for Leave to Appeal sets forth the following issues pursuant to the First Amendment of the United States Constitution:

A. That the provisions of the City of East Detroit anti-obscenity ordinance are as written and/or applied, repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments, pursuant to the Constitution of the United States, in that said provisions are void for vagueness and/or in the alternative are void for overbreadth.

B. Said provisions are impermissibly overly broad and repugnant to the requirements of the Fifth and Fourteenth Amendments to the Constitution of the

United States by employing means lacking adequate safeguards which due process demands to assure non-obscene material the constitutional protections of the First, Fourth, Fifth, Sixth and Fourteenth Amendments to which it is entitled.

On December 5, 1975, the Michigan Supreme Court granted Respondent's Application for Leave to Appeal, limited to the first issue raised by Respondent's Application for Leave. The Respondents then filed an Amended Application for Leave to Appeal which was granted by the Michigan Supreme Court on the 5th day of January, 1976.

The issues argued and briefed before the State of Michigan Supreme Court were as follows:

I. Does the East Detroit Obscenity Ordinance infringe Defendants First Amendment rights as guaranteed by the Fourteenth Amendment of the Federal Constitution and the Michigan Constitution Article I §5 (1963)?

II. Is the East Detroit Obscenity Ordinance preempted by the State obscenity ordinance and by Article I §5 of the Michigan Constitution (1963), and does the local Ordinance therefore violate the provisions of Article VII §22 of the Michigan Constitution (1963)?

III. Was the seizure of the films pursuant to a search warrant issued upon an Affidavit of a police officer who had personally viewed the subject films permissible under the First, Fourth and Fourteenth Amendments to the United States Constitution, and Article I §5 and §11 of the Michigan Constitution (1963)?

IV. Are the criminal complaints and warrants upon which the prosecutions herein were commenced jurisdictionally defective in that they fail to allege scienter or guilty knowledge?

On the 6th day of October, 1977, the State of Michigan Supreme Court issued its Opinion, in which four Justices concurred and reversed the trial court's conviction of the Defendants.

The Supreme Court of the State of Michigan in its Opinion states at Paragraph 2, "Given the comprehensive coverage of the field under the state statutory scheme, MCL 750.343a et seq, and the need for a uniform, statewide definition of criminal obscenity offenses for purposes of protecting free speech and effectively deterring obscenity, we hold that East Detroit's anti-obscenity ordinance is preempted by the existing state statutory scheme and is thus unconstitutional under the Const. 1963, Art. VII, §22.

Statewide definition of obscenity allows for both vigorous, effective local prosecution under state law, and the protection of legitimate freedom of expression."

The Federal question presented herein, "does the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment and as construed by this Court in *Miller v. California*, grant and guarantee a local municipality the right to regulate obscene material?" was first raised by Respondents in the Trial Court pursuant to their Motion for Summary Judgment. The Trial Court denied Respondent's Motion and found that the East Detroit Ordinance was constitutionally permissible pursuant to the First and Fourteenth Amendments, and in light of *Miller v. California*, supra.

Respondents then filed Application for Leave to Appeal to the Michigan Court of Appeals and raised the identical Federal constitutional questions. The Michigan Court of Appeals denied Respondent's Application for Leave to Appeal.

The Respondents then filed Application for Leave to Appeal with the State of Michigan Supreme Court and an Amended Application for Leave to Appeal, both of which raised the identical Federal constitutional issues.

The Federal question was therefore raised in the Trial Court, the Michigan Court of Appeals, and the State of Michigan Supreme Court.

ARGUMENT

Petitioners, People of the City of East Detroit, seek review of the Supreme Court of the State of Michigan decisions in these cases for the following reasons:

A. The State of Michigan Supreme Court has decided that Petitioners (a local municipality) may not enact and enforce an Ordinance regulating obscene material. The Petitioners assert that said decisions are contrary to the First and Fourteenth Amendments of the United States Constitution, as interpreted and applied by *Miller v. California*, and that said Federal question has not been heretofore decided by this Honorable Court and therefore seek review.

B. The State of Michigan Supreme Court has failed to follow the Federal Constitutional requirements set forth in *Miller v. California*, supra.

Roth v. United States, 254 US 476, 1 L Ed 2d 1498, 77 S Ct 1304 (1957), rejected the claim that obscene materials were protected by the First Amendment. This Court stated in that Opinion:

> "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same Judgment expressed by this Court in *Chaplinsky v. New Hampshire*, 315 US 568, 571-572 (86 L Ed 1031, 62 S Ct 766)."

In *Chaplinsky*, supra, the Court stated:

> "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise a constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefits that may be derived by them is clearly outweighed by the social interest in order and morality . . . ."

In June of 1973, when this Court decided *Miller v. California*, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607 (1973), it stated at page 413:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. *Kois v. Wisconsin*, 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245 (1972), 'The First and Fourteenth Amendments have never been treated as absolutes.' *Beard v. Alexandria*, 341 US 642, 95 L Ed 1233, 35 ALR2d 353. We

> acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value."

The Court goes on to state:

> "The basic guidelines for the trier of fact must be:
>
> A. Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, supra;
>
> B. Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law;
>
> C. Whether the work taken as a whole lacks serious literary, artistic, political or scientific value."

At page 431 of the *Miller* Opinion, the Court states:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (B) of the standard announced in this Opinion, supra.
>
> A. Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> B. Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Continuing at page 432, the Court states:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict the described patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."

Pursuant to this Court's Opinion in *Miller v. California*, supra, the People of the City of East Detroit, on February 25, 1974, amended their Obscenity Ordinance, pursuant to the guidelines set forth in *Miller v. California*. At the trial of this matter, before the Honorable Judge Walter P. Cynar, Macomb County Circuit Court Judge, Respondents argued on two occasions that the Amended East Detroit Ordinance was

unconstitutional pursuant to the First and Fourteenth Amendments. The trial Court held that the Ordinance was constitutional pursuant to the First and Fourteenth Amendments, and after a trial by jury, the Respondents were found guilty of the showing of obscene motion picture films, contrary to said Ordinance.

The Michigan Court of Appeals refused to review Respondent's Application for Leave to Appeal, seeking review of the trial Court's decision, therefore implicitly affirming the constitutionality of the East Detroit Obscenity Ordinance.

The State of Michigan Supreme Court granted Respondent's Application for Leave to Appeal and issued its Opinion in this matter on the 6th day of October, 1977. Said Opinion sets out to determine whether the East Detroit Ordinance has been preempted by the State of Michigan obscenity Statute, MCLA 750.343a et seq.

The State of Michigan Supreme Court, at page 3 of its Opinion, sets forth the following criteria for determining whether or not a municipality is precluded from enacting an Ordinance:

1. Is the Ordinance in direct conflict with the State statutory scheme?

2. Does the State statutory scheme preempt the Ordinance by occupying the field of regulation which the municipality seeks to enter, even where there is no direct conflict between the two schemes of regulation?

The Supreme Court of the State of Michigan goes on to conclude that the State statutory scheme occupies the field of regulation which East Detroit seeks to enter so

as to preempt the field. The Court in making said determination looked to certain guidelines stated as follows:

1. Does the State law expressly provide that the State's authority is exclusive? *Noey v. City of Saginaw*, 271 Mich 590, 261 NW 88 (1935).

2. Can preemption be implied from an examination of legislative history? *Walsh v. City of River Rouge*, 385 Mich 623, 189 NW2d 318 (1971).

3. The pervasiveness of a state regulatory scheme may support a finding of preemption. *Grand Haven v. Groceries Cooperative Dairy Company*, 330 Mich 694, 702; 48 NW2d 362 (1951). The Court goes on to state under (.3) that:

> "While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer preemption, it is a factor which should be considered as evidence of preemption."

4. The nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the State's purpose or interests.

The Court, at page 6, states:

> "The four guidelines outlined above lead us to conclude that the State, in its criminal obscenity statutory scheme, has preempted the field of regulation which East Detroit seeks to enter with its anti-obscenity Ordinance.
>
> The Supreme Court of The State of Michigan, in analyzing the four criteria set out above, states as follows:

> 1. The State law does not expressly provide that the state's authority to regulate the area of obscenity is exclusive.
>
> 2. We have no express statutory language nor legislative history which indicates one way or the other whether the state statutory scheme preempts an Ordinance such as the one before us.
>
> 3. An examination of the state statutory scheme reveals a broad, detailed and multi-faceted attack on the sale, distribution and exhibition of obscenity. The breadth and detail of this statutory scheme provides an indication that the legislature has preempted the definition and deterrence of criminal obscenity, at least to the exclusion of a supplementary Ordinance such as the one before us, which seeks to establish its own definition and test of obscenity.
>
> 4. Finally, the Court states that the definition and prohibition of obscenity offenses is clearly an area of the law which demands uniform, statewide treatment."

Petitioners maintain that criterion number one and two as set forth above clearly evidence a lack of preemption by the State statute. Criterion number three is discussed hereafter in light of *People v. Bloss*, supra. The fourth criterion is clearly incorrect as a matter of Federal constitutional law, as discussed hereinafter.

Petitioners maintain that the decision of the State of Michigan Supreme Court clearly violated the guidelines set forth in *Miller v. California*, with respect to permitted regulation of obscenity, pursuant to the First and Fourteenth Amendments of the United States Constitution.

The Supreme Court of the State of Michigan has in effect said that the same statute which they declined to construe in *People v. Bloss*, supra, has preempted the regulation of obscenity in the State of Michigan. The finding of preemption is difficult to understand in light of the State of Michigan Supreme Court's statement on page 81 of *People v. Bloss*, supra, that:

> "We are divided as to whether such statutes can properly be construed by us without further legislative expression as proscribing the dissemination of 'obscene material' to consenting adults."

That statement was made by the State of Michigan Supreme Court after *People v. Bloss* had been remanded by this Honorable Court along with numerous companion cases of *Miller v. California*, supra. It is immediately apparent when the State of Michigan obscenity statute, MCLA 750.343a, et seq., is reviewed in light of *Miller v. California*, that it does not comply with the requirement set forth by *Miller v. California*, supra, that the statute define sexual conduct which is sought to be regulated.

How can the Supreme Court of the State of Michigan decide that a statute which they have refused to construe as permitted by *Miller*, and which clearly fails to comply with the *Miller* requirements, can possibly preempt the field of regulation in the State of Michigan?

Such a decision by the Supreme Court of the State of Michigan has left the State of Michigan and every local municipality totally without an effective means of regulating the distribution of obscene materials, as permitted by *Miller v. California*, supra.

Petitioners assert that the Supreme Court for the State of Michigan, in reaching its decision, has failed to follow and apply the First and Fourteenth Amendment requirements set forth in *Miller v. California*, supra. At page 434 of this Court's Opinion, in *Miller v. California*, the Court states:

> "This may not be an easy road, free from difficulty, but no amount of 'fatigue' should lead us to adopt a convenient 'institutional' rationale — an absolutist, 'anything goes' view of the First Amendment — because it will lighten our burdens. *'Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the Constitutional guarantees.' Jacobellis v. Ohio*, 378 US 184, 12 L Ed 2d 793, 84 S Ct 1676 (1964). Nor should we remedy, 'tension' between state and Federal courts by arbitrarily depriving the states of the power reserved to them under the Constitution, a power which they have enjoyed in exercise continuously from before the adoption of the First Amendment to this day."

The People of the City of East Detroit respectfully submit that the same First Amendment guarantees pursuant to the United States Constitution as this Court recognized in *Jacobellis v. Ohio*, supra, exist and must be applied to a local municipality.

At page 434 of *Miller*, this Court states:

> "Under a national Constitution, the fundamental First Amendment limitations do not vary from community to community, but this does not mean that there are or can be fixed or uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive'. These are essentially questions of fact and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all fifty states in a single formulation, even assuming that prerequisite concensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient', it would be unrealistic to require that the answer be based on some abstract formulation."
>
> "Nothing in the First Amendment requires that juries consider hypothetical and unascertainable national standards when attempting to determine whether certain materials are obscene as a matter of fact. *Miller v. California*, supra, page 435."

Further, at page 435 of the *Miller* decision, this Court cites Chief Justice Warren's dissent in *Jacobellis v. Ohio*, supra, at page 200, 12 L Ed 2d 793:

> "It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards', it meant community standards — not a national standard as is sometimes argued. I believe that there is no

> provable 'national standard' . . . and, at all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

The People of the City of East Detroit, Petitioners herein, assert that in accordance with this Court's decision of *Miller v. California*, supra, the following First Amendment rights and guarantees of the United States Constitution were established:

A. Obscene material is not protected by the First Amendment.

B. Such material may be regulated as long as such regulation is restricted to hard core sexual conduct specifically defined by regulating law.

C. That obscenity is to be determined by applying "contemporary community standards" and not "national standards".

The result of the *Miller v. California* decision as it affects First Amendment rights pursuant to the United States Constitution is that this Court has recognized that a local community is the proper frame of reference for making the factual determination of what is or is not obscene as defined by *Miller*. The natural effect of *Miller* is therefore that a local municipality may enact an ordinance which regulates obscenity.

It can no longer be questioned that there is a legitimate state interest in regulating commerce and obscene material and in regulating exhibition of obscene materials in places of public accommodation, including so called "adult" theaters, from which minors are excluded. *Paris Adult Theatre I v. Slayton*, 413 US 49, 37 L Ed 2d 446, 19 S Ct 2638 (1973). It is also clear that

the display of obscene material to consenting adults does not enjoy constitutional protection pursuant to the First Amendment. *Paris Adult Theatre I v. Slayton*, supra, at page 463. Commercial exploitation of depictions, descriptions or exhibitions of obscene conduct on commercial premises open to the adult public falls within the State's broad power to regulate commerce to protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as wrongful or sinful. The states have the power to make a morally neutral judgment. Public exhibition of obscene material or commerce in such material has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the State's "right to maintain a decent society". *Jacobellis v. Ohio*, supra.

There are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interest "other than those of the advocates are involved". These include the interest of the public and the quality of life and the total community environment, the tone of the commerce in the great city centers, and, possibly the public safety itself. The Hill-Link Minority Report to the Commission of Obscenity and Pornography indicates there is at least an arguable correlation between obscene material and crime, *The Report of the Commission on Obscenity and Pornography*, 390-412 (1970).

The Court continues in *Paris*, supra:

> "Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickle:
>
> > "It concerns the tone of society, the mode or to use terms that have perhaps currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his own room, or expose himself indecently there . . . we should protect his privacy. But if he demands a right to obtain books and pictures he wants in the market, and to forgather in public places — discrete, if you will, but accessible to all — with others who share his taste, then to grant him his right is to effect the world about the rest of us, and to infringe on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, wanted or not." 22 *The Public Interest*, Pages 25-26 (Winter 1971).

In *Hamling v. United States*, 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887 (1974) at page 613, this Court states that pursuant to the standard set forth in *Miller*, a juror in an obscenity case is entitled to draw on his own knowledge of the views of the average person in the

community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a reasonable person in other areas of the law. The Court goes on to state:

> "Our holding in *Miller*, that California could constitutionally proscribe obscenity in terms of a 'statewide' standard, did not mean that any such precise geographic area is required as a matter of constitutional law. The result of the *Miller* case therefore as a matter of constitutional law and Federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion the average person, applying contemporary community standards, would reach in the given case."

Clearly, the finding of the Supreme Court for the State of Michigan contravenes the express language of *Hamling v. United States*, supra. If a juror sitting on an obscenity case is specifically allowed to draw on his knowledge of a local community or vicinage, then the clear constitutional determination of *Miller v. California*, supra, is that a statewide standard is not required by the First Amendment in the regulation of obscenity.

In *Jenkins v. Georgia*, 418 US 153, 41 L Ed 2d 642, 94 S Ct 2750 (1974), the Court at page 648 stated:

> "We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a

> *hypothetical statewide community* [emphasis added]. *Miller* approved the use of such instruction; it did not mandate their use. What *Miller* makes clear is that the state juries need not be instructed to apply 'national standards'."

Petitioners respectfully submit that the Michigan Court of Appeals in the case of *People of the City of East Detroit v. Vickery*, 69 Mich App 183; 244 NW2d 404 (1976) at page 199, correctly assesses the interests of a municipal ity in the regulation of obscenity. A copy of the Opinion is included in Appendix A, at page 60.

> "Our review of Michigan case law, and our assessment of the interests a municipality could have in the regulation of obscenity, convinces us that obscenity is the subject of 'municipal concern'.
>
> We believe that a social problem does not lose its character as a municipal concern merely because the state is also interested in addressing the issue. It may be that statewide regulation more readily solves the problem and that a state has a greater interest in a uniform treatment of the problem; these factors are to be analyzed in determining if the state has preempted the area, or if there is an impermissible state-municipality conflict. These factors do not detract from the issues status as a municipal concern. Because particular communities may desire more rigorous or more lax regulations of obscenity, or merely because municipalities are legitimately interested in the alleged evils caused by obscenity, obscenity is a municipal concern . . ."

SUMMARY

1. Obscene material is unprotected by the First Amendment of the United States Constitution. *Miller v. California*, supra.

2. Obscene material may be regulated and/or proscribed where:

A. The average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest. *Kois v. Wisconsin*, supra.

B. The material depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law. *Miller v. California*, supra.

C. The material taken as a whole lacks serious literary, artistic, political or scientific value. *Miller v. California*, supra.

3. There is a legitimate state interest at stake in stemming the tide of commercialized obscenity. *Paris Adult Theatre I v. Slayton*, supra.

4. There is no constitutional requirement that obscenity be regulated by the use of a statewide standard. *Hamling v. United States*, supra.

Pursuant to the above cited authority, Petitioner, People of the City of East Detroit, submit that a local municipality may enact and enforce a local obscenity ordinance pursuant to the First and Fourteenth Amendments of the United States Constitution, as construed and interpreted by this Court in *Miller v. California*, supra; *Paris Adult Theatre I v. Slayton*, supra; and *Hamling v. United States*, supra.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Petitioner, the People of the City of East Detroit, respectfully request that this Petition for a Writ of Certiorari be granted to review the State of Michigan Supreme Court decisions in People of the City of East Detroit v. James D. Llewellyn and Las Vegas Cinema, Inc.; People of the City of East Detroit v. Robert L. Vickery, Galen Odell Brayboy and William Linington; and Capri Theatre Company, Inc. a Michigan Corporation v. City of East Detroit, a Michigan Municipal Corporation, Mayor of the City of East Detroit and Chief of Police of the City of East Detroit.

Respectfully submitted,

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APPENDIX A

OPINION

(State of Michigan — Supreme Court)

(Filed October 6, 1977)

People of the State of Michigan, Plaintiff-Appellee, v James D. Llewellyn, and Las Vegas Cinema, Inc., Defendants-Appellants.

BEFORE THE ENTIRE BENCH

PER CURIAM

This case is an appeal of convictions for exhibition of two allegedly obscene films under an East Detroit anti-obscenity ordinance. Defendants argue that their convictions must be reversed because the anti-obscenity ordinance in question is preempted by the existing state statutory scheme governing criminal obscenity offenses, and is thus unconstitutional under Const 1963, art 7, §22

Given the comprehensive coverage of the field under the state statutory scheme, MCLA 750.343a *et seq.*; MSA 28.575(1) *et seq.*, and the need for a uniform, statewide definition of criminal obscenity offenses for purposes of protecting free speech and effectively deterring obscenity, we hold that East Detroit's anti-obscenity ordinance is preempted by the existing state statutory scheme and is thus unconstitutional under Const 1963, art 7, §22.

Statewide definition of obscenity allows for both vigorous, effective local prosecution under state law and the protection of legitimate freedom of expression. Moreover, localities may supplement the protection afforded them under the state obscenity statutory scheme with municipal zoning, such as that recently promulgated in Detroit, designed to regulate the location of establishments featuring so-called "adult entertainment." Such municipal zoning ordinances are outside the field of prohibition occupied by the state statutory scheme.

In the light of our holding, the other questions posed by defendant need not be resolved. The trial court is reversed.

I — FACTS

In March, 1974, Defendants James Llewellyn and Las Vegas Cinema, Inc., were charged with violation of Chapter 129 of Title IX §§9.301, 9.302, 9.303, and 9.305 of the ordinance of the City of East Detroit governing the sale, transmutation and possession of obscene materials. More specifically, defendants were charged with exhibiting two allegedly obscene motion pictures.

The two motion pictures in question were seized pursuant to a search warrant issued by a magistrate of the Municipal Court of the City of East Detroit upon the affidavit of a police officer.

Defendants were tried before a jury in the Municipal Court of the City of East Detroit and were convicted.

An appeal *de novo* was taken to the Macomb County Circuit Court, and the jury returned a guilty verdict as to both defendants.

The Court of Appeals denied leave to appeal. We granted leave to appeal on January 5, 1976.

II — PREEMPTION

Under Const 1963, art 7, §22, a Michigan municipality's power to adopt resolutions and ordinances relating to municipal concerns is "subject to the constitution and law."[1] Thus, the dispositive issue in this case is whether the Legislature, through its enactment of MCLA 750.343a *et seq.*; MSA 28.575(1) *et seq.*, has preempted the East Detroit obscenity ordinance under which the defendants were convicted.[2]

Since the state statutory scheme defines and prohibits obscenity offenses, we are deciding in part whether a municipality is preempted from establishing its own definition of and standards for obscenity.[3]

A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme,[4] or 2) if the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulations.[5]

In this case, we conclude, for reasons discussed below, that the state statutory scheme occupies the field of regulation which East Detroit seeks to enter so as to preempt the field.

In making the determination that the state has thus preempted the field of regulation which the city seeks to enter in this case, we look to certain guidelines.[6]

First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted. *Noey v City of Saginaw*, 271 Mich 595; 261 NW 88 (1935).[7]

Second, preemption of a field of regulation may be implied upon an examination of legislative history. *Walsh* v *City of River Rouge*, 385 Mich 623; 189 NW2d 318 (1971).[8]

Third, the pervasiveness of the state regulatory scheme may support a finding of preemption. *Grand Haven* v *Grocer's Cooperative Dairy Co*, 330 Mich 694, 702; 48 NW2d 362 (1951); *In re Lane*, 58 Cal 2d 99; 22 Cal Rptr 857; 372 P2d 897 (1962);[9] *Montgomery County Council* v *Montgomery Ass'n, Inc*, 274 Md 52; 325 A2d 112, 333 A2d 596 (1975).[10] While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer preemption, it is a factor which should be considered as evidence of preemption.[11]

Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

As to this last point, examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld.[12]

However, where the Court has found that the nature of the subject matter regulated called for a uniform state regulatory scheme, supplementary local regulation has been held preempted. Especially pertinent to the instant case in this regard is *Walsh* v *City of River Rouge, supra,* where this Court held preempted a municipal ordinance granting certain emergency powers to the mayor. The subject matter of the ordinance in *Walsh* involved the potential restriction of important civil liberties of the people, as does the case before us. The Court apparently concluded that the protection of these important civil liberties demanded that the state retain sole control of the circumstances under which the emergency powers would be exercised. 385 Mich 623, 639.

See also *Noey* v *City of Saginaw, supra* (the state was held to have exclusive authority to control alcoholic beverage traffic, with specific reference to the need for uniformity); *City of Grand Haven* v *Grocer's Cooperative Dairy Co,* 330 Mich 694; 48 NW2d 362 (1951) (the state was held to have exclusive control over the pasteurization of milk).[13]

The four guidelines outlined above lead us to conclude that the state, in its criminal obscenity statutory scheme, has preempted the field of regulation which East Detroit seeks to enter with its anti-obscenity ordinance.

We have no express statutory language nor legislative history which indicates one way or the other whether the state statutory scheme preempts an ordinance such as the one before us.

However, the two other factors to be considered indicate that an ordinance such as the one before us has been preempted because the comprehensiveness of the statutory scheme established by the state shows a preemptive intent, and because the nature of the regulated subject matter demands uniform, statewide treatment.

As to the comprehensiveness issue, an examination of the state statutory scheme reveals a broad, detailed, and multifaceted attack on the sale, distribution and exhibition of obscenity.

In enacting the present statutory scheme, MCLA 750.343a *et seq.;* MSA 28.575(1) *et seq.,* the Legislature replaced its much simpler predecessor, MCLA 750.343; MSA 28.575[14] with a detailed five-section statutory framework intended to define and regulate obscenity.

The first section, MCLA 750.343a; MSA 28.575(1) prohibits the sale, transmutation, and exhibition of obscene material. Moreover, a standard for a prima facie case of the prohibited conduct is established, and the penalty for conviction is provided.

MCLA 750.343b; MSA 28.575(2) establishes with particularity the definition and the standards for obscenity to be applied in cases under MCLA 750.343a; MSA 28.575(1).

MCLA 750.343c; MSA 28.575(3) provides that any person who publishes or distributes material portraying illicit sex or perversion is guilty of violating §343a.

MCLA 750.343d; MSA 28.575(4) prohibits the conditioning of distribution of a publ ication upon the acceptance of materials covered under §343a.

Finally, MCLA 750.343e; MSA 28.575(5) specifically prohibits the distribution of obscene materials to minors, providing also its own penalty provision.

The breadth and detail of this statutory scheme provides an indication that the Legislature has preempted the definition and deterrence of criminal obscenity, at least to the exclusion of a supplementary ordinance such as the one before us, which seeks to establish its own definition and test for obscenity; to modify the state standards for a prima facie case of the prohibited conduct, and to alter the state prescribed punishment upon conviction.

This conclusion is buttressed by the fact that, for reasons discussed below, the definition and prohibition of obscenity offenses is clearly an area of the law which demands uniform, statewide treatment.

First, it seems clear that if each locality in the state of Michigan were allowed to establish its own definition of obscenity, a great deal of uncertainty and confusion would be created. We observe that no less than the United States Supreme Court has had over a period of decades considerable difficulty in defining the line between obscenity and protected speech and determining what material constituted obscenity under such a definition. To allow each of the multitude of Michigan localities to establish its own definition of obscenity would be to invite the cultivation of a legal thicket which would make both the scope of the individual right to free expression and the permissible prohibition of obscenity well-nigh impossible to determine.

Second, a balkanized system of obscenity definition and prohibition would, through the resultant confusion and provocation of endless appeals, both threaten important individual rights and undermine efficiency in the control of obscenity.

On the one hand, the uncertainty created by local definitions of obscenity would effectively chill the right to free expression,[15] and raise serious due process problems in that an unwary national or statewide distributor of books or films may be subject to criminal prosecution and incarceration although there was little opportunity to discover the nature of the prohibited conduct. It is a long-standing rule in this state that criminal offenses must establish with reasonable certainty the elements of the offense so that all persons subject to their penalties may know what acts it is their duty to avoid. *People* v *Goulding*, 275 Mich 353, 358 *et seq.*; 266 NW 378 (1936). The unfairness which is at the root of this rule is also present where local definition of obscenity in municipalities of all sizes across the state makes it extremely difficult for a national or statewide distributor to determine what acts it is his or her duty to avoid.[16]

On the other hand, a uniform, statewide system of obscenity regulation provides not only the fairest, but also the most effective means of combating obscenity. A balkanized system of obscenity regulation undoubtedly would cause criminal prosecutions under local ordinances to be considerably delayed in the appellate system. Such would be the case because a holding of an appellate court that a particular obscenity conviction was valid would not necessarily be dispositive of other convictions, even those involving the very same allegedly obscene materials, if the conviction were obtained under different local standards for obscenity. We note also that such a situation would put a heavy burden on a state appellate system already confronted with an ever-increasing caseload, and thus further slow appellate review of all cases.

For all the above reasons, we hold that the state has preempted the field which the municipality in this case seeks to enter.[17]

In so holding, we join at least two sister states who have reached a similar conclusion. *Dimor, Inc* v *City of Passaic*, 122 N J Super 296; 300 A2d 191, 194 (1973), the Court was asked to determine the validity of a local ordinance prohibiting the showing of obscene motion pictures given the existence of a state statute governing obscenity. The Court held the ordinance invalid stating: "It is clear that the matter of obscenity must be governed by a uniform mode of treatment."

In *Whitney* v *Municipal Court of San Francisco*, 58 Cal 2d 907; 27 Cal Rptr 16; 377 P2d 80 (1962), the California Supreme Court held that the state had occupied the field of regulating the criminal aspects of obscene exhibitions, and hence a city ordinance prohibiting the showing of obscene motion pictures was preempted. See also *In re Moss*, 58 Cal 2d 117; 23 Cal Rptr 361; 373 P2d 425 (1962).

In reaching our holding today, we understand that many municipalities in this state wish to aggressively combat the dissemination of obscene materials in their locality, and we have no desire to deter that goal.

As we have suggested above, we feel that statewide regulation of obscenity is not only the fairest, but also the most effective means of regulating obscenity, and each Michigan municipality has available to it the protection which the state statutory scheme provides.

Moreover, we do not mean to suggest in this opinion that a municipality is preempted from enacting ordinances outside the field of regulation occupied by the state statutory scheme governing criminal obscenity. For example, there is not the slightest indication that the state Legislature acted in MCLA 750.343a *et seq.*; MSA 28.575(1) *et seq.* to preclude local zoning ordinances governing the location of establishments featuring "adult entertainment" such as that recently approved by the United States Supreme Court in *Young* v *American Mini Theatres, Inc*, 427 US 50; 96 S Ct 2440; 49 L Ed 2d 310 (1976).

The Detroit ordinance challenged in *Young* involved zoning, not criminal prohibition, and "adult establishments" featuring erotica not defined in terms of obscenity. Clearly, then, such municipal regulation is outside of the state's present statutory scheme governing criminal obscenity. In addition, the need for uniformity which has been in part the foundation of our opinion today has little relevance to such zoning ordinances, which speak to a significant local need to regulate the location of "adult establishments" and which are primarily local in their effect.[18]

The United States Supreme Court in upholding the Detroit ordinance under the Equal Protection Clause of the Fourteenth Amendment stated as follows:

> "*** the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 427 US 50, 71.

We concur with the United States Supreme Court's judgment that it is important that government be allowed to regulate the location of adult establishments through zoning ordinances, and nothing in today's opinion should be interpreted to the contrary.

The trial court's conviction of defendants is hereby reversed.

/s/ G. Mennen Williams
/s/ Thomas Giles Kavanagh
/s/ Blair Moody Jr.
/s/ Charles L. Levin.

FOOTNOTES

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[1] East Detroit is a home rule city. Under the Home Rule Act, MCLA 117.4j(3); MSA 5.2083(3), the power of the home rule city to exercise its power is similarly "subject to the constitution and general laws of this state."

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[2] The language of the ordinance is taken from the state statutory scheme, MCLA 750.343a *et seq.*; MSA 28.575(1) *et seq.*, with certain exceptions.

First, the ordinance defines the obscene material as "describing, or relating to 'Specified Sexual Activities' " outlined in §9.305A of the ordinance. [See Appellant's Appendix, E-5.] The state statutory scheme has no such provision.

Second, section 9.302 of the ordinance adds a three-pronged test of obscenity to the language of the state statutory scheme. [See Appellant's Appendix, E-2.]

Third, section 9.306 of the ordinance provides for a penalty of no more than ninety days in jail and/or a fine of not more than $500. MCLA 343a; MSA 28.575(1) provides for a penalty of not more than 1 year in jail and/or a fine of not more than $1,000.

Finally, section 9.301 of the ordinance provides that possession of 3 or more obscene articles is prima facie evidence of possession with intent to sell, distribute or show obscene material. MCLA 750.343a; MSA 28.575(1) has similar language indicating possession of 6 or more articles establishes a prima facie case.

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[3] The question of the impact of the requirements for obscenity regulation laid down by the United States Supreme Court in *Miller* v *California*, 413 US 15; 93 S Ct 2607; 37 L Ed 2d 419 (1973) on the state criminal obscenity statutes was not raised or argued by the parties. We therefore need not consider this question in the instant case.

We note, however, that our invitation to the Legislature in *People* v *Bloss*, 394 Mich 79; 228 NW2d 384 (1975) to supplement the state statutory scheme proscribing the dissemination of obscene materials has to this point not been acted on. This Court continues to believe that it would be in the best interests of the state for the Legislature to act in this regard.

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[4] *See Builders Ass'n* v *Detroit*, 295 Mich 272, 277; 294 NW 677 (1940); *see also Walsh* v *River Rouge*, 385 Mich 623, 637; 189 NW2d 318 (1971); *Miller* v *Fabius Twp Board*, 366 Mich 250, 258; 114 NW2d 205 (1962). A direct conflict exists under these cases when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits.

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[5] *Grand Haven* v *Grocer's Cooperative Dairy Co*, 330 Mich 694, 702; 48 NW2d 362 (1951); *Walsh* v *River Rouge, supra. See also Miller* v *Fabius Twp Board*, 366 Mich 250, 258; 114 NW2d 205 (1962); *Detroit* v *Recorder's Court Judge*, 56 Mich App 224, 227-228; 223 NW2d 722 (1974); Feiler, *Conflict Between State and Local Enactments – The Doctrine of Implied Consent*, 2 Urban Lawyer 398, 408 (1971).

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[6] For discussions of state-municipality preemption problems, *see* the following articles: Blease, *Civil Liberties and the California Law of Preemption*, 17 Hast L J 517 (1966); Note, *Constitutional Law – Pornography – Colorado Municipal Government Authority to Regulate Obscene Materials*, 51 Denver L J 75 (1974); Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 Harv L Rev 737 (1959); Feiler, *Conflict Between State and Local Enactments – The Doctrine of Implied Preemption, supra*.

[7] In *Noey*, the state constitution granted the Legislature the authority to establish a liquor control commission which, subject to statutory limitation, "shall exercise complete control of the alcoholic beverage traffic within this State." 271 Mich 595, 596.

Pursuant to this constitutional provision the Legislature enacted a statute creating a liquor control commission and wrote "[e]xcept as by this act otherwise provided, the commission shall have the sole right, power and duty to control the alcoholic beverage traffic***." 271 Mich 595, 596-597.

In the light of these provisions, the Court held that an ordinance setting the permissible time period for selling alcoholic beverages was invalid.

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[8] In *Walsh* v *City of River Rouge*, this Court was asked to determine whether an emergency curfew ordinance granting certain emergency powers to the local mayor was preempted given the existence of a state statute granting similar emergency powers to the governor. The Court held that the emergency powers granted to the governor by the statute were exclusive, and that therefore the municipality was preempted from promulgating an ordinance granting the same emergency powers to the mayor.

In reaching its conclusion, this Court noted that the statute in question had been enacted in 1945, and tnat in 1968 and 1970 the Legislature had approved bills granting localities certain emergency powers. In both instances, the bills were vetoed by the governor.

It was partially in the light of this history that the Court concluded that 1945 statute had vested the emergency powers in question exclusively in the governor.

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[9] In *In re Lane*, 58 Cal 2d 99, 103; 22 Cal Rptr 857; 372 P2d 897 (1962), the Cal ifornia Supreme Court held that a city ordinance attempting to make sexual intercourse between unmarried persons a crime was preempted. The Court, in so holding, looked to the comprehensiveness of the statutory scheme:

> "The Penal Code sections covering the criminal aspect of sexual activity are so extensive in their scope that they clearly show an intention by the Legislature to adopt a general scheme for the regulation of this subject." 372 P2d 897, 899.

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[10] In *Montgomery County Council* v *Montgomery Ass'n, Inc*, 274 Md 52, 64-65; 325 A2d 112, 333 A2d 596 (1975), Maryland's highest appellate court, the Court of Appeals, held that county ordinances designed to regulate the campaign finance practices of certain candidates for county office were preempted, in part due to the comprehensiveness of the State Election Code. 333 A2d 596, 601.

It is also significant that in cases dealing with the analogous problem of *Federal* preemption, the pervasiveness of the Federal regulatory scheme is one of the well-settled guidelines in determining Federal preemption. *Northern States Power Co* v *Minnesota*, 447 F2d 1143, 1146 (CA 8, 1971); *Pennsylvania* v *Nelson*, 350 US 497, 502-504; 76 S Ct 477; 100 L Ed 640 (1956); *Rice* v *Sante Fe Elevator Corp*, 331 US 218, 230; 67 S Ct 1146; 91 L Ed 1447 (1947).

See also the articles cited in fn 5.

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[11] *See* discussion to that effect in Note, *Municipal Corporations: Ordinances in Conflict with General Laws: Preemption by the State of Field of Regulating Criminal Aspects of Sexual Activity*, 10 UCLA L Rev 440, 444 (1963); Recent Decision, *Local Legislation – Implied Preemption by Occupation – Local Election Ordinances Held Invalid Because State Legislation Impliedly Preempted Field*, 35 Md L Rev 543, 550 (1976).

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[12] *See People* v *McGraw*, 184 Mich 233, 238; 150 NW 836 (1915) (traffic ordinances allowed because it was "absolutely necessary * * * to enact rules and regulations peculiarly adapted to the conditions * * * found [in the locality]"); *Eanes* v *Detroit*, 279 Mich 531; 272 NW 896 (1937) (ord inance fixing operating hours for barber shops held not preempted, but struck down on other grounds); *Loose* v *Battle Creek*, 309 Mich 1; 14 NW2d 554 (1944) (zoning ordinance upheld); *Howell* v *Kaal*, 341 Mich 585; 67 NW2d 704 (1954) (zoning ordinance upheld); *Bane* v *Pontiac Twp*, 343 Mich 481; 72 NW2d 134 (1955) (provision of local zoning ordinance upheld on preemption grounds; other provisions struck down for other reasons). *Palmer* v *Superior Twp*, 60 Mich App 664, 677 *et seq.*; 233 NW2d 14 (1975) (zoning ordinance upheld); *contra Richards* v *Pontiac*, 305 Mich 666; 9 NW2d 885 (1943) (zoning ordinance was struck down, but its holding was modified in *Loose, supra*, and *Bane, supra*, to uphold the ordinances in those cases); *Miller* v *Fabius Twp Board*, 366 Mich 250, 260; 114 NW2d 205 (1962) (ordinance regulating the permissible hours for water skiing upheld).

[13] For discussion of the need for uniformity as a factor to be discussed in preemption cases, *see* Feiler, *Conflict Between State and Local Enactments – The Doctrine of Implied Preemption*, 2 Urban Lawyer 398, 404 (1971); Blease, *Civil Liberties and the California Law of Preemption, supra*; Note, *Constitutional Law – Pornography – Colorado Municipal Government Authority to Regulate Obscene Materials, supra*.

[14] The text of this now repealed statute can be found in *Butler* v *Michigan*, 352 US 380, 381; 77 S Ct 524; 1 L Ed 2d 412 (1957).

[15] *See* discussion in Blease, *Civil Liberties and California Law of Preemption, supra*, and Note, *Constitutional Law – Pornography – Colorado Municipal Government Authority to Regulate Obscene Materials, supra*.

[16] *See In re Lane, supra*, where Chief Justice Gibson of the California Supreme Court suggests that a multiplicity of divergent regulations regarding sexual conduct might unfairly entrap an unwary and transient populance. 58 Cal 2d 99, 111; 372 P2d 897, 904 (concurring opinion). *See also Lambert* v *California*, 355 US 225; 78 S Ct 240; 2 L Ed 2d 228 (1957).

[17] We recognize that a statewide standard for obscenity is not mandated by the First Amendment of the United States Constitution as interpreted in *Hamling* v *United States*, 418 US 87, 105; 94 S Ct 2887; 41 L Ed 2d 590 (1974).

However, that is not the question before us. We deal here not with an interpretation of the First Amendment, but rather with an interpretation of the preemptive effect of Michigan criminal obscenity statutes under art 7, §22 of our own Constitution.

We hold that the ordinances at hand are preempted because this state has concluded that a uniform statutory scheme is necessary to achieve the purpose and protect the values involved in obscenity legislation.

[18] See fn 12, citing numerous cases upholding the right of municipalities to enact zoning ordinances against challenges asserting state preemption.

OPINION

(State of Michigan — Supreme Court)

People of the State of Michigan, Plaintiff-Appellee, v James D. Llewellyn, and Las Vegas Cinema, Inc., Defendants-Appellants.

BEFORE THE ENTIRE BENCH

RYAN, J. [Dissenting]

Today my colleagues have struck down the City of East Detroit's obscenity ordinance,[1] and in consequent effect every other comparable obscenity ordinance in the state, on the grounds that the state criminal obscenity statute[2] has preempted that field of legislation.

If indeed the state had preempted the field of obscenity legislation, municipal ordinances of the East Detroit type would offend Const 1963, art 7, §22.[3] Because I am persuaded there has been no preemption, I respectfully dissent.

East Detroit is a "home rule city" with authority[4] to adopt a city charter which may provide:

> "For the enforcement of all such local, police, sanitary and other regulations as are not in conflict with the general laws." MCLA 117.4i(9); MSA 5.2082(9)

and,

> "For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be

> expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state." MCLA 117.4j(3); MSA 5.2083(3).

In pursuance thereof, the city adopted a charter, C 2, §1 of which provides that the city may regulate or prevent all things "detrimental to the health, morals, comfort, safety, convenience and welfare of the inhabitants of the city." Pursuant to this charter authority, the city council adopted the aforementioned obscenity ordinance.

That the regulation of activities affecting public morals and welfare is a proper "municipal concern" is a proposition well settled in our cases. See *Watnick* v *Detroit*, 365 Mich 600; 113 NW2d 876 (1962); *People* v *Sell*, 310 Mich 305; 17 NW2d 193 (1945); *People* v *Pennock*, 294 Mich 578; 293 NW 759 (1940). See also, *Young* v *American Mini Theaters*, 427 US 50 (1976). Incontrovertibly, obscenity is a matter germane to public morals and welfare.

The majority has concluded that the state statutory scheme has preempted the East Detroit obscenity ordinance, and all those like it, for two reasons:

1) "[B]ecause the comprehensiveness of the statutory scheme established by the state shows a preemptive [legislative] intent," and

2) "[B]ecause the nature of the regulated subject matter demands uniform, statewide treatment."

In my view that conclusion is neither legally nor factually sound.

Essentially, the principle of preemption is that when general law on a specific subject occupies a particular field so completely that any local ordinances seeking to regulate conduct in that field will necessarily conflict because of inconsistency between the two, the ordinance must give way to the general law.

Consequently, to justify the conclusion in this case that the state legislation has preempted the field of obscenity regulation, it must be clearly evident that the East Detroit ordinance is in direct conflict with the constitution or a state statute. Merely because the state has entered into the field of obscenity regulation is no justification for the implication that local regulation will necessarily conflict. When the Legislature prohibits certain conduct, local communities may nevertheless prohibit other and different conduct in the same field, providing the state and local enactments are not in conflict.

We addressed this aspect of the preemption doctrine in a different context in *Miller* v *Fabius Township Board*, 366 Mich 250, 256-257; 114 NW2d 205 (1962), in which we quoted approvingly from 37 Am Jur, Municipal Corporations, §165, p 790 as follows:

> "It has been held that in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits. * * *

"The mere fact that the State, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail."

Until today, this Court has consistently followed the quoted rule in holding that portions of a field not covered by state law are open to local regulation. *Miller* v *Fabius Township Board, supra; City of Howell* v *Kaal*, 341 Mich 585; 67 NW2d 704 (1954); *Loose* v *City of Battle Creek*, 309 Mich 1; 14 NW2d 554 (1944); *Eanes* v *City of Detroit*, 279 Mich 531; 272 NW 896 (1937); *People* v *McGraw*, 184 Mich 233; 150 NW 836 (1915).

"The rule has long been recognized that municipalities are not divested of all control even where the legislature has enacted laws." *Miller, supra*, p 257.

This Court has never inferred preemption merely because the state and local communities have legislated in the same field. On the contrary, in order to insure the reasonableness of such a finding and to properly safeguard the authority of local communities, this Court has always demonstrated an express showing of the Legislature's intent to exclusively occupy the field before invalidating an ordinance on preemptive grounds.[5]

The majority concedes that there is "no express statutory language nor legislative history which indicates one way or the other whether the state statutory scheme preempts an ordinance such as the one before us." The Court thus appears to overlook our precedential requirement that an express showing of a legislative expression of intent to preempt the field be made before we will invalidate a local ordinance.

The language of the statute itself in no sense expresses or even infers an intent to occupy the field of obscenity regulation to the exclusion of local communities.

The first of the two reasons assigned by the majority for finding preemption is that "the comprehensiveness of the statutory scheme established by the state shows a preemptive intent." That the statute in question is not sufficiently comprehensive to suggest such a legislative intent is evident from a line by line comparison of it with the ordinance. The ordinance forbids nothing the statute permits and permits nothing the statute forbids,

criteria we approved in *Miller, supra*. Further evidence that the statute lacks the preemptive comprehensiveness claimed for it by the majority in this Court's on the record declaration in *People* v *Bloss*, 394 Mich 79, 81; 228 NW2d 384 (1975), while speaking of the statute here in question, that:

> "We are divided as to whether such statutes can properly be construed by us *without further legislative expression* as proscribing the dissemination of 'obscene' material to consenting adults." (Emphasis added.)

Absent such construction or subsequent legislation,[6] local ordinances proscribing such conduct can hardly be said to be inconsistent with the general law or the general law be held so comprehensive as to preempt local ord inances.

Because the state law has neither expressly nor by reasonable inference permitted the dissemination of obscene material to consenting adults, on that point alone it is unquestionably within the province of local authorities to further protect their legitimate interests in the field of obscenity legislation through the enactment of local ordinances prohibiting such conduct.

The second reason relied upon by the Court in concluding that the ordinance before us is preempted is ". . . because the nature of the regulated subject matter demands uniform, statewide treatment."

The fact that a subject is one which logically lends itself to statewide uniform regulation or even demands it is hardly justification for the conclusion that such legislation has been enacted, or if enacted is in conflict with local ordinances on the subject. More significantly, whether the regulation of obscenity "demands uniform,

statewide treatment" is a judgment for the Legislature to make, not the judiciary. It has given no indication to date, despite this Court's invitation in *Bloss, supra*, of an intent to preemptively provide the comprehensive, uniform statewide regulation my colleagues say the subject demands.

The considerations advanced by the majority in favor of preemption are factors to be weighed by our state Legislature in deliberations concerning future obscenity legislation.

Should the Legislature deem it appropriate, it may choose to completely occupy the field at that time. Under the present statutory scheme, however, local governments are not prohibited from legislating in the interest of furthering a valid "municipal concern" by regulating obscenity within their respective communities in a manner that does not conflict with the state's non-exclusive regulation in this field.

The prevailing opinion does violence to the legitimate interests of our municipalities in locally regulating a subject of vital concern to them by striking down virtually every ordinance in Michigan proscribing obscenity, despite the fact that the state has not adequately legislated in the field.

/s/ James L. Ryan
/s/ Mary S. Coleman
/s/ John W. Fitzgerald

FOOTNOTES

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[1] Chapter 129 of Title IX, §§9.301, 9.302, 9.303 and 9.305.

[2] MCLA 750.343a *et seq.*; MSA 28.575(1) *et seq.*

[3] Const 1963, art 7, §22 provides:

> "Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section."

[4] MCLA 117.4i; MSA 5.2082.

[5] From *Walsh* v *City of River Rouge*, 385 Mich 623, 635; 189 NW2d 318 (1971):

> "The act specifically declares in §2, 'the legislative intent [is] to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose.' "

From *Grand Haven* v *Grocer's Cooperative Dairy Co*, 330 Mich 694, 701; 48 NW2d 362 (1951):

> "That by enactment of the pertinent statutory provisions, the legislature intended to and did take over plenary control of pasteurization of dairy products is quite conclusively indicated by the following quoted sections of the statute:
>
> " 'Sec. 1. The purpose of this act is to secure the wholesomeness and safety of milk, cream, skimmed milk and other milk products by requiring pasteurization as herein set forth.'
>
> * * *
>
> " 'Sec. 5. It shall be the duty of the department of agriculture to enforce the provisions of this act.' 1948 CL 288.131, 288.135; MSA 12.693[11], 12.693[15])."

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From *Builders Ass'n* v *Detroit*, 295 Mich 272, 275-276; 294 NW 677 (1940):

> "The State statute provides, in part, as follows:
>
> " 'No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game, or play on the first day of the week. The foregoing provisions shall not apply to works of necessity and charity, nor to the making of mutual promises of marriage, nor to the solemnization of marriages. And every person so offending shall be punished by fine not exceeding ten dollars for each offense.' 2 Comp. Laws 1929, §9078 [Stat. Ann. §18.851].
>
> " 'No person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day, shall be liable to the penalties provided in this chapter, for performing secular business or labor on the said first day of the week, provided he disturb no other person.' 2 Comp. Laws 1929, §9083 [Stat. Ann. §18.855].
>
> * * *
>
> "In the instant case the legislature, in prohibiting the transaction of business on Sunday, exempts from the application of the statute those who conscientiously believe that the seventh day of the week should be observed as the Sabbath, providing they disturb no other person. No such exception is to be found in the ordinance before us. It applies to all alike, regardless of religious convictions. It denies to the conscientious observer of the seventh day of the week as the Sabbath the right to transact business on Sunday, which is granted such individual by the exception to be found in the statute. It attempts to prohibit that which the statute permits and is, therefore, void."

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From *Noey* v *City of Saginaw*, 271 Mich 595, 598; 261 NW 88 (1935):

> "The power conferred upon the city under the constitutional provision is 'subject to the Constitution and general laws of this State.' The constitutional amendment, providing for a liquor control commission, vested in it when established by act of the legislature *'complete control of the alcoholic beverage traffic within this State, including the retail sales thereof.'* The legislature, after providing for its creation, conferred upon it, subject to certain exceptions, *'the sole right, power and duty to control the alcoholic beverage traffic* * * * within the State,' and to *'adopt rules and regulations governing the carrying out of this act and supplemental thereto.'*
>
> "The word 'control,' as used in the Constitution, means to regulate and govern."

[6] None has been forthcoming to date.

ORDER DENYING APPLICATION FOR REHEARING

(State of Michigan — Supreme Court)

People of the State of Michigan, Plaintiff-Appellee, v James D. Llewellyn, and Las Vegas Cinema, Inc., Defendants-Appellants.

Rehearing No. 434

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 15th day of December in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

In this cause an application for rehearing is considered and is hereby DENIED.

State of Michigan — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 15th day of December in the year of our Lord one thousand nine hundred and seventy-seven.

/s/ Corbin R. Davis, Deputy Clerk.

ORDER REVERSING CONVICTIONS

(State of Michigan — Supreme Court)

People of the City of East Detroit, Plaintiff-Appellee, v Robert L. Vickery, Galen Odell Braboy and William Linington, Defendants-Appellants.

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 27th day of October in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, defendants-appellants' application for leave to appeal having been ordered held in abeyance pending decision in *People* v *Llewellyn* (Docket No. 56872), and said decision having been issued on October 6, 1977, 401 Mich _____,

Now, therefore, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, the decision of the Court of Appeals is reversed in part, because cities may not exact ordinances on the subject of obscenity since the state has preempted this field of regulation. *People* v *Llewellyn*, 401 Mich _____ (1977). Insofar as defendants' convictions have been reversed by the circuit court and the Court of Appeals, those courts' decisions are affirmed.

State of Michigan — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 28th day of October in the year of our Lord one thousand nine hundred and seventy-seven.

/s/ Harold Hoag, Clerk

ORDER DENYING RECONSIDERATION

(State of Michigan — Supreme Court)

(People Of The City Of East Detroit, a Michigan municipal corporation, Plaintiff-Appellee, v. Robert L. Vickery, Galen Odell Braboy and William Linington, Defendants-Appellants.)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 29th day of December in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable Thomas Giles Kavanagh, Chief Justice; G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, defendants-appellants' application for rehearing is DENIED because GCR 1963, 864.4, provides for the filing of such applications only in opinion cases. Defendants-appellants' application is treated as a motion for reconsideration of this Court's order of October 27, 1977, and the motion is DENIED, because it does not appear to the Court that said order was entered erroneously.

Certificate

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of December in the year of our Lord one thousand nine hundred and seventy-seven.

/s/ Corbin R. Davis, Deputy Clerk

OPINION

(State of Michigan — Court of Appeals)

People of the City of East Detroit, Plaintiff-Appellant, v Robert L. Vickery, Galen Odell Braboy and William Linington, Defendants-Appellees.

Before: Danhof, P.J., and V. J. Brennan and Kelly, J. J.

V. J. BRENNAN, J.

We must determine if a municipality may enact ordinances imposing criminal liability for the display of obscene motion pictures and, if possessing the authority to do so, the City of East Detroit has enacted ordinances that are permissible under the First Amendment of the United States Constitution.[1]

The City of East Detroit, in July 1973, enacted ordinances purporting to punish obscenity. The regulations that are pertinent to this case are set out in the margin.[2] In October, 1973, defendants — president, manager, and projectionist of the Capri Theatre — were charged with violating the ordinances by the Theatre's showing of "The Collegiates." They were found guilty of violating the ordinances after a bench trial in the East Detroit Municipal Court.

On appeal, the Macomb County Circuit Court ruled that a municipality is without power to "legislate for itself its own standards as to what is and what is not obscenity * * * [L]ocal communities shall have the right to determine by local juries what standards should apply, but these standards are applied by local juries and courts of law under prosecution of applicable state law."

The circuit court apparently based this legal conclusion on his interpretation of United States Supreme Court obscenity cases.

The people bring this appeal, contending that, because a municipality may enact obscenity ordinances and because these particular ordinances are constitutionally sound, defendants' convictions under the ordinances may stand. Defendants argue that East Detroit lacked the authority to enact the ordinances, and even if authority existed, the ordinances do not pass constitutional muster because of their lack of requisite specificity.

I. MUNICIPALITY AUTHORITY TO ENACT OBSCENITY ORDINANCES

A. UNDER UNITED STATES CONSTITUTIONAL LAW

We find nothing in the U.S. Constitution or in Supreme Court obscenity cases that would prohibit municipalities from enacting criminal obscenity ordinances. In fact, our research indicates that the Supreme Court has given tacit, if not outright, approval of municipal regulation of obscenity.

It is true, as defendants note, that *Miller* v *California*, 413 US 15; 93 S Ct 2607; 37 L Ed 2d 419 (1973), repeatedly discusses "state" regulation of obscenity:

"[W]e are called upon to define the standards which must be used to identify obscene material that a *state* may regulate without infringing the First Amendment as granted to the States through the Fourteenth Amendment." (Emphasis added.) 413 US at 19-20; 93 S Ct at 2612; 37 L Ed 2d at 428.

"The basic guidelines for the trier of fact must be:

"* * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the *applicable state law*." 413 US at 24; 93 S Ct at 2615; 37 L Ed 2d at 419. (Emphasis added.)

However, because the *Miller* case involved the constitutionality of a State of California statute, it is understandable that the Court posed the issue and undertook the analysis with reference to "a state." Neither *Miller*, nor the subsequent obscenity cases of *Hamling* v *United States*, 418 US 87; 94 S Ct 2887; 41 L Ed 2d 590 (1974) and *Jenkins* v *Georgia*, 418 US 153, 94 S Ct 2750, 41 L Ed 2d 642 (1974), raised the precise issue of a municipality's ability to regulate obscenity.

Hamling and *Jenkins*, by allowing a juror "to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case" 418 US at 105; 94 S Ct at 2901; 41 L Ed 2d at 613, acknowledged that local community mores may be determinative of obscenity. It follows from this recognition of the importance of community standards that municipalities can regulate obscenity without necessarily running afoul of the First Amendment.

A recent Supreme Court case involving First Amendment issues, though not specifically addressing obscenity questions, implicitly suggests that municipal ordinances regulating speech will not be struck down merely because they are municipal ordinances rather than state statutes. *Erznoznik* v *City of Jacksonville*, _____ US _____, _____ n 3; 95 S Ct 2268, 2272 n 3; 45 L Ed 2d 125, 130 n 3 (1975). For U.S. Constitutional law

purposes, a municipal ordinance may be considered state law. We conclude that there is no absolute prohibition against municipalities regulating obscenity to be found in cases interpreting the U.S. Constitution. See also *Times Film Corporation* v *City of Chicago*, 365 US 43; 81 S Ct 391; 5 L Ed 2d 403 (1961).

B. UNDER MICHIGAN LAW

The City of East Detroit is a home rule city with powers under MCLA 117.4(i); MSA 5.2082(9) to adopt a charter that provides for:

"the enforcement of all such local, police, sanitary, and other regulations as are not in conflict with the general laws."

The home rule statutory scheme[3] also provides that a city charter may provide:

"For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state." MCLA 117.4(j)(3); MSA 5.2083(3).

The city's revised charter, c. Z, §I, provides that the city may regulate or prevent all things "detrimental to the health, morals, comfort, safety, convenience and welfare of the inhabitants of the city * * *." Pursuant to this charter authority, the city council adopted the aforementioned obscenity ordinances.[4]

We must determine whether obscenity regulation is a "municipal concern." If a municipal concern, we must consider whether the state statutory provisions on obscenity preempt municipal regulation. Finally, if there is no preemption, we must decide whether or not there is a conflict between the state statute and the municipal ordinance.

1. "MUNICIPAL CONCERN"

Both the Michigan Constitution, Art VII, §22, and the home rule statute, MCLA 117.4(j)(3); MSA 5.2083(3), limit municipal regulatory authority to areas of "municipal concern." As the constitutionality of an ordinance is presumed, *People* v *Sell*, 310 Mich 305, 314; 17 NW2d 193, 195 (1945), defendants bear the burden of showing that the obscenity ordinances are of no municipal concern in that they bear no real or substantive relation to the public health, morals, safety, or general welfare of the municipality. See *Austin* v *Older*, 283 Mich 667, 674; 278 NW 707 (1938) and *Kalita* v *City of Detroit*, 57 Mich App 696, 703; 226 NW2d 699 (1975). The defendants have not met that burden.

Our review of Michigan case law, and our assessment of the interests a municipality could have in the regulation of obscenity, convince us that obscenity is a subject of "municipal concern."

Municipal ordinances regulating morals have previously been upheld as municipal concerns. E.g., *Watnik* v *City of Detroit*, 365 Mich 600; 113 NW2d 876 (1962) (Sunday closing laws.) See also *People* v *Pennock*, 294 Mich 578; 293 NW 759 (1940).

We believe that a social problem does not lose its character as a municipal concern merely because the state is also interested in addressing the issue. It may be that statewide regulation more readily solves a problem and that a state has a greater interest in a uniform treatment of the problem; these factors are to be analyzed in determining if the state has preempted the area or if there is an impermissible state-municipality conflict. These factors do not detract from the issue's status as a municipal concern.

Because particular communities may desire more rigorous or more lax regulations of obscenity, or merely because municipalities are legitimately interested in the alleged evils caused by obscenity, obscenity is a municipal concern. Of course, the validity of local ordinances must be tested under other principles of law: state preemption, impermissible conflict with statutes, and infringement of free speech rights. The existence of these other legal doctrines does not mean that obscenity does not concern local governments. We have no doubt that obscenity is a municipal concern. See *Soof* v *City of Highland Park*, 30 Mich App 400, 406; 186 NW2d 361 (1971).

2. STATE PREEMPTION

Another panel of this Court has recently concluded:

"Neither the state criminal obscenity statutes, MCLA 750.343a *et seq*; MSA 28.575(1) *et seq*, nor the civil obscenity statute, MCLA 600.2938; MSA 27A.2938, expressly preempt the obscenity field. If either statute or the statutes taken together regulate every area of the obscenity field, then we may say that the state has preempted the field." *Suits* v *Meridian Township*, 60 Mich App 347, 350; 230 NW2d 426 (1975).

The *Suits* case may be distinguishable in that the Meridian Township ordinance in that case regulated "public display" of offensive sexually explicit material, a subject not covered by the state criminal obscenity statutes. 60 Mich App at 350. In the present case, the challenged ordinance covers a topic — display of motion picture film — explicitly covered in the statute MCLA 750.343(a), MSA 28.575(1). The preemption argument may be stronger here because of this overlap in the coverage of the statute and the ordinance.

Nonetheless, despite this overlap that could distinguish the *Suits* holding, we do not believe that the legislature has preempted the regulation of obscenity by passage of the obscenity statutes. We read this conclusion after consideration of previous preemption cases.

In *Walsh* v *City of River Rouge*, 385 Mich 623; 189 NW2d 318 (1971), our Supreme Court found that a municipality was without power to enact an ordinance giving emergency powers to a mayor because the legislature had given the governor the exclusive authority to declare a state of emergency. The Court ruled that the statute preempted the field. Present in the *Walsh* case, and notably absent here, was a clear legislative history that left no doubt about the legislature's intentions. Moreover, as the statute itself provided for grants of emergency power by the governor to the mayors, the express language of the statute supported a finding of preemptive legislative intent.

Noey v *Saginaw*, 271 Mich 595; 261 NW 88 (1935), found preemption of the control of alcoholic beverage traffic and voided a municipal ordinance attempting to

regulate liquor licenses. The language of the statute establishing a liquor control commission indicated that the commission was to have "complete control" and the "sole right, power and duty to control." 271 Mich at 598. There is no such clear and unequivocal statement of legislative intent in the state obscenity statutes.[5]

Miller v Fabius Township Board, 366 Mich 250; 114 NW2d 205 (1962), found no statutory preemption of the field of water skiing because the legislature did not expressly state an intent to preempt the field. We repeat that an express legislative statement of preemption is absent in the obscenity statutes. MCLA 750.343a *et seq*; MSA 28.575(1) *et seq*. We therefore conclude that municipalities are not statutorily preempted from regulating obscenity.

As was stated in *Suits, supra*:

"We cecline the preemption argument and suggest that plaintiffs' policy argument that preemption should occur in this area of the law is one for legislative consideration." 60 Mich App at 350.

3. CONFLICT BETWEEN STATE STATUTE AND MUNICIPAL ORDINANCE

Although we find no statutory preemption of obscenity regulation, we could strike down the municipal ordinance if we were to conclude that the ordinance and the statute impermissibly conflict. *Miller v Fabius Township, supra*, 366 Mich at 258. See also *Detroit v Recorder's Court Judge*, 56 Mich App 224, 227; 223 NW2d 722 (1974). We are unable to determine if there is a conflict between MCLA 750.343(a); MSA 28.575(1) and the municipal ordinance because our Supreme Court in *People v Bloss*, 394 Mich 79; 228 NW2d 384 (1975), has stated:

"We are persuaded that defendant's conviction cannot stand for the reason that at the time he did the act complained of this Court had not construed the obscenity statutes (as permitted in Miller) to proscribe such conduct.

* * *

"We are divided as to whether such statutes can properly be construed by us without further legislative expression as proscribing the dissemination of 'obscene' material to consenting adults. See Const 1963, art 1, §5." 394 Mich at 81 (footnote omitted).

In short, after *Bloss* we cannot be certain what MCLA 750.343(a) *et seq;* MSA 28.575(1) *et seq* prohibits or permits. C.f., *Kent County Prosecutor v Robert Emmett Goodrich Corp*, 53 Mich App 267; 218 NW2d 771 (1974). We can therefore make no determination of a conflict between the statute and the ordinance.

We suspect that even if we knew what the statute specifically prohibited, we would have some difficulty in determining if there is a conflict.[6] The question of conflict is "difficult of solution, and cannot be determined by any fixed rule. Each particular case must be determined as it arises." *National Amusement Co v Johnson*, 270 Mich 613, 613; 259 NW 342, 343 (1935), citing *State v Brittain*, 89 NC 74. We are saved from having to determine if there is a conflict by the *Bloss* case. Given no clear expression defining the scope of the state obscenity statute, we are unable to find a conflict.

Because we conclude that the City of East Detroit can consider obscenity a municipal concern, because the state statutes have not preempted obscenity regulation, and because there is no conflict in the East Detroit ordinance and the state statutes, we must examine the validity of the ordinance under the First Amendment.

III. ORDINANCE VALIDITY UNDER FIRST AMENDMENT

We have no doubt that parts of the ordinance under which defendants were tried and convicted are invalid while other parts are clearly valid.[7] The ordinance, although not wanting in specificity, exceed the "substantive constitutional limitations * * * on the type of material subject to * * * a determination [of what a jury might find patently offensive.]" *Jenkins v Georgia*, 418 US 153, 160-161; 94 S Ct 2750, 2755; 41 L Ed 2d 642, 650 (1974).

The ordinance, by prohibiting, among other things, "(a) Less than completely and opaquely covered:

* * *

"(2) Buttock.

"(3) Female breast below a point immediately above the top of the areola."

seem to go too far.[8] They attempt to prohibit nudity, whereas "nudity alone is not enough to make material legally obscene * * *." *Jenkins, supra*, 418 US at 161; 94 S Ct at 2755; 41 L Ed 2d at 650.

Because the above examples detailed in the ordinance do not necessarily constitute patently offensive, hardcore sexual conduct, the convictions must fall, for

"there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is patently offensive within the meaning of the obscenity test set forth in the Miller cases." *Hamling, supra*, 418 US at 114, 94 S Ct at 2906; 41 L Ed 2d at 619.

In short, while this ordinance is sufficiently specific to give fair notice of proscribed material, certain specific prohibitions are constitutionally impermissible because they condemn material that is not patently offensive.

The defendants' convictions in the East Detroit Municipal Court may have been based on those parts of the ordinance that are most clearly invalid. We have no trial court opinion that indicates what particular sections of the ordinance were violated. Because at least parts of the ordinance condemn constitutionally protected speech, and because we are unable to determine which sections the trial judge considered, we affirm the Macomb County Circuit Court's reversal of defendants' convictions.

FOOTNOTES

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[1] US Const, Am I.

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[2] "Section 9.301. Obscene, sadistic or masochistic literature, recording or image; penalty for sale, transmutation, or possession.

"Any person who knowingly either sells, lends, gives away, distributes, shows or transmutes or offers either to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to either sell, lend, give away, distribute, show or transmute, or advertise in any manner, or who otherwise knowingly offers for either loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy or indecent, sadistic or masochistic book, magazine, pamphlet, newspaper, story paper, writing paper, phonograph record, picture, photograph, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of an indecent character, which is distinguished or characterized by its emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas.' (as defined below

(continued on next page)

(continued from preceding page)

in Section 9.305A), which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representation of such character, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in Section 9.306 of this Ordinance.

"For the purpose of this Section, possession of 3 or more identical copies, or 3 or more articles of any obscene, lewd, lascivious, filthy or indecent book, magazine, pamphlet, newspaper, story paper, writing paper, phonograph record, picture drawing, tape recording, or any written, printed or recorded matter of an indecent character, which is distinguished or characterized by its emphasis on matter depicting, describing or relating to 'Specified Sexual Activities: or "Specified Anatomical Areas." ' (as defined below in Section 9.305A), shall be prima facie evidence of possession with intent to sell, lend, give away, distribute, show or transmute the thing.

* * *

"Section 9.305A Definitions

"(1) 'Specified Sexual Activities' are defined as:

"(a) Human genitals in a state of sexual stimulation or arousal;

"(b) Acts of human masturbation, sexual intercourse, or sodomy;

"(c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

"(2) 'Specified Anatomical Areas: are defined as:

'(a) Less than completely and opaquely covered:

'(1) Human genitals, pubic region.

'(2) Buttock.

'(3) Female breast below a point immediately above the top of the areola.

'(b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.' " East Detroit Ordinances, c 129, §§9.301, 9.305A.

[3] The statutory authority for a home-rule city is in turn derived from Mich Const, Art VII, §22:

"Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section."

[4] See n. 2, *supra*.

[5] Moreover, it is possible that the Court in *Noey v Saginaw*, 271 Mich 595; 261 NW 88 (1935), misread the legislative intent. Subsequent cases suggest that liquor license regulation is peculiarly a concern of local communities. *Bundo v City of Walled Lake*, ____ Mich ____; ____ NW2d ____ (Docket #55935, released to the parties January 27, 1976).

[6] The specific difficulty we envision is assessing the conflict between a statute that very narrowly defines obscenity and an ordinance that contains a broader definition while still complying with *Miller v California*, 413 US 15; 93 S Ct 2607; 37 L Ed 2d 419 (1973). Is there a conflict if the municipality prohibits what a statute does not expressly permit but only declines to prohibit? C.f., *People v Drost*, 353 Mich 691; 91 NW2d 851 (1959). Because we deal with First Amendment issues, is the conflict analysis any different than that used to assess conflicts in fields such as water skiing regulation? *Miller v Fabius*, 366 Mich 250; 114 NW2d 205 (1962).

[7] Subsequent amendments to the ordinance cannot be considered in assessing the constitutionality of defendants' convictions under the ordinances extant at their arrests. See Mich Const 1963, Art 1, §10, and *People v Marshall*, 362 Mich 170, 174; 106 NW2d 842 (1961).

[8] Our condemnation of these particular provisions in the ordinances is not to be considered approval of the remainder of the ordinances. We emphasize the quoted prohibitions only to illustrate the furthest reaches of the ordinances.

OPINION

(State of Michigan — Court of Appeals)

People of the the City of East Detroit, Plaintiff-Appellant, v Robert L. Vickery, Galen Odell Braboy and William Linington, Defendants-Appellees.

BEFORE: Danhof, P.J., and V.J. Brennan and M.J. Kelly, JJ.

Danhof, P.J., Dissenting

The circuit court judge rested his decision to quash the complaint and warrant upon a single ground.

"The Court does agree with the argument of the Defendant that local communities shall have the right to determine by local juries what standards shall apply, but that these standards are applied by local juries and courts of law under prosecution of applicable state law.

"It is the Opinion of this Court that the standards by which obscenity is to be judged in this state or in any other state must be set by the Legislature of that state. It is perfectly obvious that local juries, in trying obscenity matters, will apply what appears to them to be their own standards in the matter, but the jury's viewpoint of a community standard and a standard set by the State Legislature may or may not be the same."

So far as the majority addresses this issue I adhere to their opinion and agree that the circuit judge erred in his conclusion. Had the majority gone no further in their analysis, reversal would have been mandated. However, they elect to address the second issue, the constitutionality of the ordinance under which the defendants were convicted. As it is presumed that the trial court will follow the law, a matter not decided by the trial court is not properly before this Court. *Shelby Mutual Insurance Co v Grand Rapids*, 6 Mich App 95, 98-99; 148 NW2d 260 (1967); *Swain v Kayko*, 44 Mich App 496, 504; 205 NW2d 477 (1973). Furthermore, since the ordinance in question has since been substantially amended, I find no compelling reason to preserve for its precedential value our assessment of its constitutionality.

I vote to reverse and remand to circuit court for further proceedings.

ORDER

(State of Michigan — Supreme Court)

(Capri Theatre Company, Inc., a Michigan Corporation, Plaintiff-Appellant, v. The City Of East Detroit, a Michigan municipal corporation, Mayor Of The City Of East Detroit, and Chief Of Police Of The City Of East Detroit, Defendants-Appellees.)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 27th day of October in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable Thomas Giles Kavanagh, Chief Justice; G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, plaintiff-appellant's application for leave to appeal having been ordered held in abeyance pending decision in *People* v *Llewellyn* (Docket No. 56872), and said decision having been issued on October 6, 1977, 401 Mich ——,

Now, therefore, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, the Court of Appeals order of August 19, 1976, is reversed insofar as it allows the defendants to enforce the anti-obscenity provisions of the East Detroit City Ordinance. The trial court injunction, therefore, is affirmed, insofar as it prevented such enforcement.

This case is remanded to the Court of Appeals for such further treatment of the case as may now be appropriate.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 28th day of October in the year of our Lord one thousand nine hundred and seventy-seven.

/s/ Harold Hoag, Clerk.

ORDER DENYING APPLICATION FOR REHEARING

(State of Michigan — Supreme Court)

(Capri Theatre Company, Inc., a Michigan Corporation, Plaintiff-Appellant, v. The City Of East Detroit, a Michigan municipal corporation, Mayor Of The City Of East Detroit, and Chief Of Police Of The City Of East Detroit, Defendants-Appellees.)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of December in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable Thomas Giles Kavanagh, Chief Justice; G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, defendants-appellees' application for rehearing is DENIED because GCR 1963, 864.4, provides for the filing of such applications only in opinion cases. Defendants-appellees' application is treated as a motion for reconsideration of this Court's order of October 27, 1977, and the motion is DENIED, because it does not appear to the Court that said order was entered erroneously.

Certificate

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of December in the year of our Lord one thousand nine hundred and seventy-seven.

/s/ Corbin R. Davis, Deputy Clerk.

ORDER DISMISSING APPEAL

(State of Michigan — Court of Appeals)

(Capri Theatre Company, Inc., a Michigan Corporation, Plaintiff-Appellee, v. The City Of East Detroit, a Michigan municipal corporation, Mayor Of The City Of East Detroit, and Chief Of Police Of The City Of East Detroit, Defendants-Appellants.)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 3rd day of March in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable Robert J. Danhof, Presiding Judge; Michael J. Kelly, Vincent J. Brennan, Judges.

In this cause, a motion to affirm is filed by plaintiff-appellee, and nothing in opposition thereto having been filed, and due consideration thereof having been had by the Court;

It Is Ordered, the Court having determined that the sole issue raised by the appellants in this appeal has been adjudicated by the Supreme Court of Michigan in its order entered on October 28, 1977, 401 Mich 843, that this appeal be, and the same is hereby DISMISSED.

Certificate

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 6th day of March in the year of our Lord one thousand nine hundred and seventy-eight.

/s/ Ronald L. Dzierbicki, Clerk

ORDER HOLDING APPLICATION FOR LEAVE TO APPEAL IN ABEYANCE

(State of Michigan — Supreme Court)

(People Of The State Of Michigan, Plaintiff-Appellee, v. Robert L. Vickery, Galen Odell Braboy and Will iam Linington, Defendants-Appellants.)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing on the 14th day of February in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable Thomas Giles Kavanagh, Chief Justice; G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered and, it appearing to this Court that the case of People v Llewellyn (Docket No. 56872) is presently pending on appeal before this Court and that the decision in that case may be decisive of an issue raised in the present application for leave to appeal, it is ORDERED that the present application be held in abeyance pending decision in People v Llewellyn.

Ryan, J., dissents and would grant leave to appeal.

Certificate

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 14th day of February in the year of our Lord one thousand nine hundred and seventy-seven.

/s/ Corbin R. Davis, Deputy Clerk

/s/ Corbin R. Davis, Deputy Clerk

ORDER HOLDING APPLICATION FOR LEAVE TO APPEAL IN ABEYANCE

(State of of Michigan — Supreme Court)

(Capri Theatre Company, Inc., a Michigan corporation, Plaintiff-Appellant, v. The City Of East Detroit, a Michigan municipal corporation, Mayor Of The City of East Detroit, and Chief Of Police Of The City Of East Detroit, Defendants-Appellees.)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 14th day of February in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable Thomas Giles Kavanagh, Chief Justice; G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered and, it appearing to this Court that the case of People v Llewellyn (Docket No. 56872) is presently pending on appeal before this Court and that the decision in that case may be decisive of an issue raised in the present application for leave to appeal, it is ORDERED that the present application be held in abeyance pending decision in People v Llewellyn.

Ryan, J., dissents and would grant leave to appeal.

Certificate

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 14th day of February in the year of our Lord one thousand nine hundred and seventy-seven.

/s/ Corbin R. Davis, Deputy Clerk

STATE OF MICHIGAN OBSCENITY STATUTE

MCLA 750.343a-e

750.343a Obscene, sadistic, or masochistic literature, recording, or image; penalty for sale, transmutation, or possession

Sec. 343a. Any person who knowingly either sells, lends, gives away, distributes, shows or transmutes or offers either to sell, lend, give away, distribute, show or transmute, or has in his possession with intent either to sell, lend, give away, distribute, show or transmute, or advertise in any manner, or who otherwise knowingly offers for either loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy or indecent, sadistic or masochistic book, magazine, pamphlet, newspaper, story paper, writing, paper, phonograph record, picture, drawing, photograph, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of an indecent character which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the county jail for not more than 1 year or by a fine of not more than $1,000.00, or by both such fine and imprisonment.)

For the purpose of this section, possession of 6 or more identical copies, or 6 or more articles of any obscene, lewd, lascivious, filthy or indecent book, magazine, pamphlet, newspaper, story paper, writing paper, phonograph record, picture drawing, photograph, slide, motion picture film, figure, image, wire or tape recording, or any written, printed or recorded matter of an indecent character, shall be prima facie evidence of possession with intent to sell, lend,

give away, distribute, show or transmute the thing. P.A.1931, No. 328, § 343a, added by P.A.1957, No. 265, § 1, Imd. Eff. June 13, 1957, as amended P.A.1961, No. 217, § 1, Eff. Sept. 8; P.A.1962, No. 64, § 1, Eff. March 28, 1963; P.A.1964, No. 143, § 1, Eff. Aug. 28.

750.343b Obscene literature, recording or image; impact upon average person of community

Sec. 343b. The test to be applied in cases under section 343a of this act[1] shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent and unmoved. But such test shall be the effect of the book, picture or other subject to complaint considered as a whole, not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged. P.A.1931, No. 328, § 343b, added by P.A.1958, No. 127, § 1, Eff. Sept. 13, 1958.

(Footnotes omitted.)

750.343c Portrayal of illicit sex, perversion

Sec. 343c. Any person who publishes or distributes for resale or for reading or other perusal any book, magazine or pamphlet, so composed as to constitute a compilation of pictures, illustrations, caricatures, cartoons, words, stories and advertisements, or any combination or combinations thereof, featuring and primarily devoted for the purpose of commercial exploitation, to the description or portrayal or suggestion of illicit sex, or sexual relations, of perversion, lust or sexual passion, or to any combination or combinations thereof, shall be guilty of a violation of section 343a of this act[1] and punished as therein provided. P.A.1931, No. 328, § 343c, added by P.A.1958, No. 127, § 1, Eff. Sept. 13, 1958.

750.343d Distribution conditioned upon inclusion of illegal matter, penalty

Sec. 343d. Any person who shall as a condition to a sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication require that the purchaser or consignee receive for resale any other article, book or other publication which is contrary to section 343a of this act,[1] or shall deny or threaten to deny . . .

750.343e Obscene, sadistic, or masochistic literature, recording, or image; distribution to minors, penalty

Sec. 343e. Whoever knowingly either sells, distributes, or imports for the purpose of selling or distributing, to a person under the age of 18 years any obscene, lewd, lascivious, filthy or indecent book, magazine, pamphlet, newspaper, story paper, writing paper, phonograph record, picture, drawing, photograph, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of an indecent character which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character, manifestly tending to corrupt the morals of youth, or introduces into a family, school or place of education, or buys, procures, receives or has in his possession any obscene, lewd, lacivious, filthy or indecent book, magazine, pamphlet, newspaper, story paper, writing, paper, phonograph record, picture, drawing, photograph, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of an indecent character which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character, either for the purpose of sale, exhibition, loan or circulation to a person under the age of 18 years or with intent to introduce the same into a family, school or place of education, shall be punished by imprisonment in the county jail for not more than 1 year or by a fine of not more than $1,000.00, or by both such fine and imprisonment. P.A. 1931, No. 328, § 343e, added by P.A.1962, No. 98, § 1, Eff. March 28, 1963; P.A.1964, No. 143, § 1, Eff. Aug. 28.

CITY OF EAST DETROIT OBSCENITY ORDINANCE

Ordinance.

TO AMEND THE CODE OF THE CITY OF EAST DETROIT, CHAPTER 129 OF TITLE IX OF SAID CODE AT SECTION 9.301, 9.302, 9.305.

CHAPTER 129 INDECENCY AND IMMORALITY

Section 9.301. Obscene, sadistic or masochistic literature, recording or image; penalty for sale, transmutation or possession.

Section 9.301 as amended, shall read:

> Any person who knowingly either sells, lends, gives away, distributes, shows or transmutes or offers either to sell, lend, give away, distribute, show or transmute, or has in his posession with intent to either, sell, lend, give away, distribute, show or transmute or advertise in any manner, or who otherwise knowingly offers for either loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy or indecent, sadistic or masochistic book, magazine, pamphlet, newspaper, story paper, writing paper, phonograph record, picture, photograph, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of an indecent character, which is distinguished or characterized by its emphasis on matter depicting, describing, or relating to "Specified Sexual Activities (as defined below in Section 9.305), which may or may not require

> mechanical or other means to be transmuted into auditory, visual or sensory representation of such character, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in Section 9.306 of this Ordinance.
>
> For the purpose of this Section, possession of three or more identical copies, or three or more articles of any obscene, lewd, lascivious, filthy or indecent book, magazine, pamphlet, newspaper, story paper, writing paper, phonograph record, picture drawing, photograph, slide, motion picture film, figure, image, wire, or tape recording, or any written, printed, or recorded matter of an indecent character, which is distinguished or characterized by its emphasis on matter depicting, describing or relating to "Specified Sexual Activities" (as defined below in Section 9.305), shall be prima facie evidence of possession with intent to sell, lend, give away, distribute, show or transmute the thing.

Section 9.302

> *Obscene literature, recording or image; impact upon average person of community offensive sexual conduct; no literary, artistic, political or scientific value*

The test to be applied in cases under Section 9 301 of this Ordinance shall be:

> (a) whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest,

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by Section 9.305A.

(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. Such test shall be the effect of the book, picture, or other subject to complaint considered as a whole upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture, or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged.

Section 9.303. Portrayal of illicit sex, perversion.

Section 9.303 as amended, shall read:

Any person who publishes or distributes for resale or for reading or other perusal any book, magazine, or pamphlet, so composed as to constitute a compilation of pictures, illustrations, caricatures, cartoons, words, stories and advertisements, or any combination or combinations thereof, featuring and primarily devoted for the purpose of commercial exploitation, to the description or portrayal or suggestion of illicit sex, or sexual relations or perversions, lust or sexual passion, or to any combination or combinations thereof, which are distinguished or characterized by its emphasis on matter depicting or relating to "Specified

Sexual Activities" (as defined in Section 9.305), shall be guilty of a violation of Section 9.301 of this Ordinance and punished as therein provided.

Section 9.305. Obscene, sadistic, or masochistic literature, recording or image; distributions to minors, penalty.

Section 9.305 as amended, shall read:

Whoever knowingly either sells, distributes or imports for the purpose of selling or distributing to a person under the age of 18 years any obscene, lewd, lascivious, filthy or indecent books, magazine, pamphlet, newspaper, story paper, writing paper, phonograph record, picture drawing, photograph, motion picture film, figure, image, wire or tape recording of any written, printed or recorded matter of an indecent character which is distinguished or characterized by its emphasis on matter depicting, describing or relating to "Specified Sexual Activities" (as defined in Section 9.305), which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character, manifestly tending to corrupt the morals of youth, or introduces into a family, school or place of education, or buys, procures, received or has in his possession any obscene, lewd, lascivious, filthy or indecent books, magazine, pamphlet, newspaper, story paper, writing paper, phonograph record, picture, drawing, photograph, motion picture film, figure, image, wire or tape recording or any

written, printed or recorded matter of an indecent character, which is distinguished or characterized by its emphasis on matter depicting, describing or relating to "Specified Sexual Activities" (as defined in Section 9.305), which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character, either for the purpose of sale, exhibition, loan or circulation to a person under the age of 18 years or with intent to introduce the same into a family, school or place of education, shall be punished as provided in Section 9.306 of this Ordinance.

Section 9.305A Definitions

(1) "Specified Sexual Activities" are defined as:

(a) Descriptions or representations of sexual intercourse which includes genital-genital, anal-genital or oral-genital, whether between human beings or between a human being and an animal, actual or simulated.

(b) Descriptions or representations of fondling or other erotic touching of human genitals, pubic region, buttock or female breast, actual or simulated.

(c) Explicit close-up representations of a human genital organ.

(d) The stimulation of the human genital organs by any device, tool, implement or object.

Section 9.309 Declaration of Effect

This Ordinance is hereby declared to be an emergency ordinance which is deemed to be necessary for the health, safety and welfare of the residents of the City of East Detroit, and to prevent the creation of nuisances and hazards to the public welfare and is hereby ordered to take immediate effect.

SEARCH WARRANT

State of Michigan, County of Macomb—ss.

To the sheriff or any constable of said county, Greetings: Whereas, Officer E. Markowicz of the East Detroit Police Dept. of the City of East Detroit, in said county, has this day made complaint on oath and in writing, before me, Martin Smith, a Municipal Judge of the city of East Detroit in said county, that he has good reason to bel ieve and does believe that the following goods, chattels and property, to wit: Two motion picture films entitled "Deep Throat" and "The Devil In Miss Jones", which were obscene in nature, or Some Portion of the Same, Is Unlawfully Stored, Kept and Concealed by: The Las Vegas Cinema Corp. in 23315 Gratiot Avenue in the City of East Detroit, County of Macomb, State of Michigan in the City of East Detroit in said county.

And Whereas, On examination, on oath of the said affiant, Officer E. Markowicz and of _____, witness, produced by the said _____, by and before me, the said Municipal Judge, I am satisfied that there is reasonable cause to believe that said goods and chattels or some portion thereof are now unlawfully kept, stored and concealed in the said Las Vegas Cinema Corp., 23315 Gratiot Avenue, E. Det., Mich., County of Macomb. In the name of the people of the state of Michigan, you are therefore hereby commanded, to enter into and upon said premises, and there make a diligent search for said goods and chattels, and if the same, or any part thereof, be found, that you bring the same before me to be disposed of according to law.

Given under my hand and seal, at the Police Dept. of East Detroit, Michigan in said county of Macomb, this 4th day of March, 1974.

/s/ Martin J. Smith

AFFIDAVIT AND COMPLAINT FOR SEARCH WARRANT

State of Michigan, County of Macomb—ss.

The affidavit and complaint, on oath and in writing, of Officer E. Markowicz of the Police Department of the City of East Detroit in said county and state, taken and made before me, Martin Smith, a Municipal Judge in and for said county, upon the 4th day of March 1974, who, being by me first duly sworn, says that on the premises known and described as follows: The Las Vegas Cinema Corp., located at 23315 Gratiot Avenue, in the City of East Detroit, the County of Macomb, State of Michigan in the county of Macomb and state of Michigan, which said premises are occupied by The Las Vegas Cinema Corp., as a _____ this affiant has good reason to believe and does believe, that certain goods, chattels and property, to wit: Two Motion Pictures entitled "Deep Throat" and the "Devil In Miss Jones" which were both obscene in nature are unlawfully stored, kept and concealed by The Las Vegas Cinema Corp. and that the facts supporting such suspicion and belief are as follows:

1. That the affiant, Officer E. Markowicz, is a Police Officer with the City of East Detroit and has been so employed for the last eight years.
2. That on March 4, 1974, this officer went to the Las Vegas Cinema Corporation located at 23315 Gratiot Avenue, City of East Detroit, County of Macomb, State of Michigan. While in this theatre, this officer did observe, in their entirety, the movies, "The Devil In Miss Jones" and "Deep Throat", both of which were completely obscene in nature.
3. That the affiant observed the acts of a female performing fellatio on a male, in the movies.
4. That the affiant observed a lesbian sex act with one female performing cunnilingus on another female.
5. That the affiant observed the act of two males, simultaneously, committing the sex act with a female by both intercourse and anal copulation.

6. That the affiant observed a female performing masturbation upon herself.

7. It is the affiant's opinion that the motion pictures "The Devil In Miss Jones" and "Deep Throat" are, in fact, obscene, lewd, lascivious, filthy and indecent motion pictures and are in violation of East Detroit City Ordinance, Chapter 129, of Title IX, as amended by Section 9.301, 9.302, 9.303, 9.305.

Wherefore, the said affiant, Officer E. Markowicz prays that a warrant may issue, directed to the sheriff or any peace officer of said county, according to the statute in such case made and provided, commanding him to forthwith search the said premises hereinbefore described, and to seize and take into his possession any of said goods and chattels, and them to safely keep, and to make immediate return on said warrant.

Taken, subscribed and sworn to before me the day and year first above written.

Affiant /s/ Eugene Markowicz

/s/ Martin J. Smith
Municipal Judge for
City of East Detroit

RETURN OF WARRANT

I hereby certify and return, that by virtue of the within search warrant to me directed, I have searched for the goods and chattels, therein named, at the place therein described, and that I have such goods and chattels before the court, described as follows:

1 Reel 16 mm Film "Devil In Miss Jones"

1 Rèel 16 mm Film "Deep Throat"

Date: 3-4-74.

/s/ E. Markowicz

77-1286

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Supreme Court, U. S.
FILED
APR 10 1978
MICHAEL RODAK, JR., CLERK

PEOPLE OF THE CITY OF EAST DETROIT,
Petitioner,

v.

JAMES D. LLEWELLYN AND LAS VEGAS CINEMA, INC.,
Respondents.

PEOPLE OF THE CITY OF EAST DETROIT,
Petitioner,

v.

ROBERT L. VICKERY, GALEN ODELL BRAYBOY, AND WILLIAM LININGTON,
Respondents.

CAPRI THEATRE COMPANY, INC., a Michigan Corporation,
Respondent,

v.

CITY OF EAST DETROIT, a Michigan Municipal Corporation, MAYOR OF THE CITY OF EAST DETROIT, and CHIEF OF POLICE OF THE CITY OF EAST DETROIT,
Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

DANER, FREEMAN, MCKENZIE & MATTHEWS, P.C.

Attorneys for Respondents

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COUNTER STATEMENT OF QUESTIONS INVOLVED

QUESTION I

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THE SHOWING OF OBSCENE MOTION PICTURES CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS INTERPRETED BY THE UNITED STATES SUPREME COURT?

Trial Court Opinion — NO.

Respondents Contend — NO.

QUESTION II

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THF SHOWING OF OBSCENE MOTION PICTURES CONSISTENT WITH THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN?

Trial Court Opinion — NO.

Respondents Contend — NO.

QUESTION III

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THE SHOWING OF OBSCENE MOTION PICTURES PURSUANT TO ITS POLICE POWERS AS A HOME RULE CITY?

Trial Court Opinion — NO.

Respondents Contend — NO.

QUESTION IV

IS THE CITY OF EAST DETROIT'S OBSCENITY ORDINANCE, CHAPTER 129, TITLE IX, AS AMENDED BY SECTION 9.305A, EFFECTIVE JULY 16, 1973, UNCONSTITUTIONAL PURSUANT TO THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF MICHIGAN?

Trial Court Opinion — YES.

Respondents Contend — YES.

QUESTION V

DID THE CITY OF EAST DETROIT, UNDER ITS OBSCENITY ORDINANCE, CHAPTER 129, TITLE IX, AS AMENDED, VIOLATE RESPONDENT'S PROCEDURAL RIGHTS AS TO SEIZURE OF FILM AND TRIAL PROCEEDINGS?

Trial Court Opinion — NOT CONSIDERED.

Respondents Contend — YES.

QUESTION I

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THE SHOWING OF OBSCENE MOTION PICTURES CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS INTERPRETED BY THE UNITED STATES SUPREME COURT?

Trial Court Opinion — NO.

Respondents Contend — NO.

Michigan Court of Appeals — YES.

Michigan Supreme Court — NO.

ARGUMENT

Respondents claim that the Ordinance under which Respondents were prosecuted is constitutionally defective and void. The pertinent parts of the Ordinance. designated as Chapter 129 of Title 9 of the Code of the CITY OF EAST DETROIT are as follows:

> "Section 9.301, as amended, shall read:
>
> "Any person who knowingly either sells, lends, gives away, distributes, shows or transmutes or offers either to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to either sell, lend, give away, distribute, show or transmute, or advertise in any manner, or who otherwise knowingly offers for either loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy or indecent, sadistic or masochistic book, magazine, pamphlet, newspaper, story paper, writing paper, phonograph record, picture, photograph, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of an indecent character, which is distinguished

or characterized by its emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," (as defined below in Section 9.305A), which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representation of such character, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in Section 9.306 of this Ordinance."

"Section 9.302 *Obscene literature, recording or image; impact upon average person of community.*

"The test to be applied in cases under Section 9.301 of this Ordinance shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent and unmoved. But such test shall be the effect of the book, picture, or other subject to complaint considered as a whole, not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture, or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

"Section 9.305A *Definitions.*

"(1) 'Specified Sexual Activities are defined as:

(a) Human genitals in a state of sexual stimulation or arousal;

(b) Acts of human masturbation, sexual intercourse or sodomy;

(c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

"(2) 'Specified Anatomical Areas' are defined as:

(a) Less than completely and opaquely covered:

(1) Human genitals, pubic region.

(2) Buttock.

(3) Female breast below a point immediately above the top of the areola.

(b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

(Please note that this is the Ordinance under which Respondents were prosecuted by the City of East Detroit, *Not* the one *later* amended by the City which appears on pages 90 through 995 of Petitioners' Brief.)

At the time the United States Supreme Court declared obscenity to be outside the First Amendment, Guarantee of Free Speech, (*Roth* v *US,* 354 US 476; 1 L Ed 2d 1498; 77 S Ct 1304 [1957]), it had attempted to define what constitutes obscenity. In *Memoirs* v *Massachusetts,* 383 US 413, 418; 16 L Ed 2d 1; 86 S Ct 975 [1966], Justice Brennan wrote:

"We defined obscenity in *Roth* in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 US at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

In *People* v *Bloss,* 388 Mich 409 [1972], and the most recent Michigan Supreme Court decision on this particular point, the Defendant, *Bloss,* was discharged from selling obscene literature because the Michigan Supreme Court found that the Defendants did not sell magazines that were constitutionally obscene, in accordance with a test applied in the case of *Redrup* v *New York,* 386 US 767; 18 L Ed 2d 515; 87 S Ct 1414 [1967]. On June 25, 1973, the United States Supreme Court vacated the Judgment and remanded the case of *People* v *Bloss,* 413 US 909; 37 L Ed 2d 1021; 93 S Ct 3060 [1973], for further proceedings in the light of *Miller, Slaton, Heller, Roaden* and other cases.

In *Redrup,* the Court required three tests to be met to determine if any material was constitutionally obscene: involvement of juveniles; assault upon individual privacy so as to make it impossible for an unwilling individual to avoid exposure to it; and evidence of pandering (see pp 416, 422 of the *Bloss* decision, *infra*). Since *Redrup,* the United States Supreme Court has reversed approximately 31 cases on the basis of that decision.

Justice Harlan noted in his concurring and dissenting opinion in *Ginsburg* v *New York,* 390 US 629, 676, 704-705, 707; 20 L Ed 2d 195; 88 S Ct 1274 [1968]:

> "The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication * * *.
>
> "The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment."

Judge Letts, the Trial Judge in *People* v *Bloss,* further said in the notes, at page 416:

> "So, therefore, it would seem that *Roth* v. *United States,* probably is, or may or may not still be the standard; and *Redcup* still may or may not be the law, because the Supreme Court has indicated that each individual case will stand or fall upon the facts as they are presented. And whether the law as it has been presented, as it has been compounded or propounded is applicable. In other words, *the entire field of obscenity is in a morass,* and it is my opinion that each case must be decided upon its own, according to its own values as presented in Court." (Emphasis added)

As pointed out in the notes in *People* v *Bloss,* page 424, Professor Frederick V. Bernard, who testified as an expert on obscenity *for* the People in Kent County Circuit Court Case No. 11929 in the prosecution of the TROPIC OF CANCER and TROPIC OF CAPRICORN, which were held to be obscene, indicated under oath that he had reread both books and said that they were absolutely *not* obscene.

Coupled with the difficulty of defining obscenity such that it can be prosecuted, is the additional difficulty in determining what was meant in the *Roth* decision that obscenity is to be defined by reference to "community standards." Chief Justice Warren, in his dissent in *Jacobellis* v *Ohio,* 378 US 184, 195; 12 L Ed 2d 793; 84 S Ct 1676 [1964], said:

> "It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards — not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' . . . At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

However, in the majority opinion written by Justice Brennan in that case, he indicated that the "community stand-

ards'' test ''must be determined on the basis of a national standard.''

Desiring to end the confusion and to formulate standards more concrete than those used in the past, the Court recently undertook to decide five more obscenity cases. In the course of its five decisions, *Miller* v *California*, 413 US 15; 37 L Ed 2d 419; 93 S Ct 2607 [1973]; *Paris Adult Theatre I* v *Slaton*, 413 US 49; 37 L Ed 2d 446; 93 S Ct 2628 [1973]; *United States* v *Orito*, 413 US 139; 37 L Ed 2d 513; 93 S Ct 2674 [1973]; *Kaplan* v *California*, 413 US 115; 37 L Ed (2) 492; 93 S Ct 2680; reh den 414 US 883; 38 L Ed (2) 131; 94 S Ct 28 [1973]; *United States* v *12 200-ft Reels of Super 8mm Film*, 413 US 123; 37 L Ed 2d 500; 93 S Ct 2665 [1973], each decided by a five to four margin, the Court enunciated a new standard for judging obscenity. The majority opinion in *Miller*, authored by Chief Justice Burger, states, at page 25:

> ''The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable STATE law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.'' (Emphasis added)

As Mr. Justice Brennan pointed out in his *Paris* dissent, the formulation approved by the majority differs very little from the *Memoirs* criteria. Parts (a) and (b) of the two formulations are virtually identical. Only part (c) of the *Miller* formulation even purports to be a significant break with the past. In adopting part (c) of its formulation, the Court explicitly rejected the ''utterly without redeeming social value'' test of *Memoirs*. Yet, its own test differs more in tone than in substance from the old one.

The real difference between *Miller* and earlier obscenity decisions of the Court is its express rejection of the national standards of *Jacobellis*. The Court conceded that the content of the First Amendment does not vary from community to community, but insisted nevertheless that it was impossible to articulate a single, national standard of what appeals to the prurient interest or is patently offensive.

The dissenting opinions of Justices Douglas and Brennan offer alternative methods of disengaging from the tangled web of obscenity litigation. Indeed, Justice Douglas asserted that the First Amendment allows no place for the control of obscenity. Justice Brennan, on the other hand, would prefer to remove restrictions on the distribution and use of obscene materials among consenting adults. Either of these approaches would certainly make obscenity law less confusing. Indeed, the Chief Justice even expressed the hope that the *Miller* formulation would provide more positive guidance in the area. But the majority conceded that the course it chose might not be an easy one, and that difficulties might continue to arise.

The difficulties became evident in an article from TIME Magazine, July 2, 1973, issue, on page 45 entitled, ''The Law,'' in which Robert Bernstein, head of Random House, saw the decision as ''a call to arms of every crazy vigilante group in this county.'' Michigan Attorney General Frank Kelly warned:

> ''This really sets us back in the dark ages. Now prosecuting attorneys in every county and state will be grandstanding, and every jury in every little community will have a crack at each new book, play and movie.''

The article went on to say that Chief Justice Burger, for a man so careful to tell the states to be precise (in the opinion) in drawing up their laws on sexual conduct, he

was remarkably imprecise in his own definition. Sexual conduct, in his view, includes "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals" as well as "ultimate sexual acts, normal or perverted." "But 'patently offensive' by whose standards?" asks the article.

It would seem, therefore, a direct review of the pertinent language of the Opinion in *Miller* v *California,* 413 US 15; 37 L Ed 2d 419; 93 S Ct 2607 [1973], is necessary to determine what the Court meant. Chief Justice Burger, in writing the majority opinion on page 20 states:

> "It is in this context that we are called on to define the standards which must be used to identify obscene material that a STATE may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment." (Emphasis added)

and indicated that it was the desire of the Court to undertake "to formulate standards more concrete than those in the past." The Chief Justice then states at pages 23 and 24:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. . . .
>
> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. STATE statutes designed to regulate obscene materials must be carefully limited. . . ." (Emphasis added)

He then stated at page 25:

> "If a STATE law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."(Emphasis added)

He further indicated at page 25:

> "We emphasize that it is not our function to propose regulatory schemes for the STATES. *That must await their concrete legislative efforts."* (Emphasis added)

However, having earlier said, "Obscene material is unprotected by the First Amendment," he then states at page 26:

> "At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection."

So the Chief Justice has indicated the existence of First Amendment protection to prurient, patently offensive sexual conduct under certain circumstances. He then concludes at page 27:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating STATE law, as written or construed." (Emphasis added)

It is noteworthy that the Defendants in this case have been the subject of prosecution without benefit of "regulating STATE law." He indicates on page 29:

> "Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the STATES of a power reserved to them under the Constitution." (Emphasis added)

In discussing community standards, the Chief Justice said at page 31:

> "During the trial, both the prosecution and the defense assumed that the relevant 'community standards' in making the factual determination of obscenity were those of the *State of California,* not some hypothetical standard of the entire United States of America."

It would seem from the Chief Justice's language in this regard that he is relating community standards to a STATE, as opposed to the former national standards laid down in *Jacobellis.*

As Justice Douglas observed in his dissent at pages 43 and 44:

> "Obscenity — which even we cannot define with precision — is a hodge-podge. To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process."

Chief Justice Burger, on the same day, delivered a majority opinion in *Paris Adult Theatre I* v *Slaton,* 413 US 49; 37 L Ed 2d 446; 93 S Ct 2628 [1973], dealing with the prosecution of two allegedly obscene films in Georgia under the Georgia statute. He indicated on pages 53 and 54:

> "We do not undertake to tell the STATES what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material." (Emphasis added)

Chief Justice Burger then states at pages 60 and 61:

> "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the *legislature of Georgia* could quite reasonably determine that such a connection does or might exist." (Emphasis added)

Chief Justice Burger concludes on page 69:

> "We have directed our holdings, not at thoughts or speech, but at depiction and description of specifically defined sexual conduct that STATES may regulate within limits designed to prevent infringement of First Amendment rights.
>
> ". . . In this case we hold that the STATES have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene materterial in places of public accommodation, including so-called 'adult' theatres from which minors are excluded." (Emphasis added)

Interesting to note from these statements by Chief Justice Burger is again (1) reiteration of power only to States; (2) his statement that the States have a legitimate interest in regulating commerce, which, obviously, a City or Township or local community would not have in its power, and (3) the language is "regulating" exhibition of obscene material, not "prohibiting" exhibition of obscene material.

As Justice Brennan observed in his dissent, at page 86:

> ". . . a vague statute fails to provide adequate notice to persons who are engaged in the type of conduct that the statute could be thought to proscribe. The Due Process Clause of the Fourteenth Amendment requires that all criminal laws provide fair notice of 'what the STATE commands or forbids.'" (Emphasis added)

Interpretation Of The Case Of *Miller* And Its Sister Cases Decided June 21, 1973

Judge Harold Leventhal, a United States Circuit Judge in the United States Court of Appeals for the District of Columbia Circuit, in the November, 1973, issue of the American Bar Association Journal, states on page 1262:

> "On balance, I venture that the Court will permit a STATE law to use a 'local' municipal or county standard, assuming the STATE legislature (or authoritative STATE court) declares that it is STATE policy to permit local option." (Emphasis added)

Judge Leventhal comments on the further problem of the language in *Miller* that work must be "taken as a whole" in applying prurient interests or serious literary value.

> "However, the words 'taken as a whole' are omitted from the patent offensiveness test. Is the jury to be instructed that it is enough if one page of a 300-page book is patently offensive, even though the book as a whole, is not?"

On page 1264 of the same article, Judge Leventhal concludes:

> "These problems suggest that the proper forum for decision is a LEGISLATURE rather than a court.
>
> "Finally, it is peculiarly a matter for the legislatures to resolve the 'local option' issue, to decide whether it is the STATE or a locality, and if so, which one, that defines the application of the STATE law's specific criteria." (Emphasis added)

Judge Leventhal concludes:

> "On the other hand, would the Supreme Court stand by if PLAYBOY were banned in Albermarle County, Virginia? The Court may start by assuming that communities will be restrained in their restraints. But would it say that a blue-nosed application of permissible standards in a community is of no concern to it?"

Following the opinion on *Miller,* a three judge panel in the Recorder's Court for the City of Detroit declared unconstitutional the Michigan Obscenity Statute, MCLA §750.-343(a), and in a case entitled *People of the State of Michi-*

gan v *One Motion Picture Film Entitled "DEEP THROAT"* Recorder's Court Search Warrant File No. 6139, the Court commented on page 3 of the Opinion:

> "Although the case of *Miller* v *California,* 408 U.S. ....., 37 L. Ed. 2d. 419, 93 S. Ct. 2607 (1973) grants the STATES greater latitude than has previously existed, the opinion in that case does not allow for unrestrained prosecutions. Nor does *Miller* leave the question of determining what to prosecute for obscenity to the unbridled discretion of individual prosecutors." (Emphasis added)

The three judge panel then stated on page 7:

> "The material sought to be prohibited must offend the current *statewide,* not national, community standards of the average person. The STATE legislature rather than this Metropolitan Court, or even our seven member Supreme Court, seems best suited for drawing the specific lines now permitted by Miller."

The Court concluded:

> ". . . that although the film DEEP THROAT is within the class of material which may legitimately be regulated by the STATE, there is no STATE law, either statutory or judicial, which 'specifically defines' the depictions of sexual conduct which the STATE may regulate or prohibit.
>
> "Until the legislature acts or, until the Michigan Supreme Court construes the existing statute to specifically designate or define what may not be depicted *there can be no prosecution for displaying the film in question."* (Emphasis added)

Again, as Chief Justice Burger indicated, there would be no prosecution under applicable STATE law; however, these Defendants were still prosecuted.

A case in which the parties *stipulated* on the record to violate the *Miller* standards is the case of *Kent County Prosecutor* v *Robert Emmett Goodrich Corporation,* 53 Mich App 267 [1974] wherein Defendant was prosecuted under Michigan Civil Obscenity Statute, MCLA §600.2938; MSA §27A.2938, for showing the film THE DEVIL IN MISS JONES in Grand Rapids.

The parties stipulated:

> ". . . that the film depicted patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibitions of the genitalia. The parties further stipulated that the film's predominant appeal is to prurient, shameful and morbid interest in nudity, sex and excretion, which went substantially beyond customary limits of candor in the community in describing or representing such matters. Finally, it was stipulated that the movie lacks serious literary, artistic, political, or scientific value."

The Court held that the Michigan Statute is couched in terms of expression rather than specifically defined sexual conduct, as required by *Miller.* It further held that only a Court of *statewide* jurisdiction, such as the Court of Appeals or the Michigan Supreme Court, could render an authoritative construction of a STATE statute, as required by the *Miller* Opinion, and it came to the conclusion that enjoining the exhibition of the film was improper. Judge McGregor stating at page 275:

> ". . . since there is no STATE law, either statutory or judicial, which 'specifically defines' the depictions of sexual conduct which the STATE may regulate. The trial judge lacked the power to authoritatively construe the statute." (Emphasis added)

Petitioner relies heavily on *Times Film Corporation* v *City of Chicago,* 365 US 43; 5 L Ed 2d 403; 81 S Ct 391 [1961]. However, this case, decided on a 5-4 decision, was based on the sole claim of "previous restraint" on freedom of speech on a very narrow issue and, as Justice Clark said at page 405:

> "It does not require that any consideration be given to the validity of the standards set out (in the Ordinance) therein."

And at page 408, he concluded:

> "We, of course, are not holding that City officials may be granted the power to prevent the showing of any motion picture they deem unworthy of a license."

and as appears from the facts in the case on appeal, this action is exactly what the CITY OF EAST DETROIT undertook.

It is also the contention of Respondents that the *Miller* case implicitly overrules the *Times Film Corporation* case wherein Chief Justice Burger made reference to said *Times* case in his statement of applicability of State law in pornography prosecution, at page 24:

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable STATE law as written or authoritatively construed." (Emphasis added)

In the cases of *Hamling* v *US,* 418 US 87; 41 L Ed 2d 590; 94 S Ct 2887 [1974], and *Jenkins* v *Georgia,* 418 US 153; 41 L Ed 2d 642; 94 S Ct 2750 [1974], Justice Rehnquist, speaking for the majority, amplifies on the question as to the *Miller* case's comment regarding national standards as opposed to community standards by stating:

> "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law."

He did go on to say:

> "Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a 'statewide' standard did not mean that any such precise geographic area is required as a matter of constitutional law."

On the same page he states:

> "Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw."

So if any conclusion can be reached from the impact upon *Miller,* it is destructive upon the position of EAST DETROIT and emphasizes the position taken by the Defendants herein that the CITY OF EAST DETROIT has tried to establish that application of "community standards" means the enactment of a City Ordinance containing standards of the local community. No such expression has been stated by the United States Supreme Court. The concept the United States Supreme Court has tried to explain is that the traditional posture of the United States Supreme Court of applying uniform national standards in judging obscenity is no longer possible and that jurors should apply standards in a geographical community of interests in applying the law, but the law that should be applied is *applicable State law.* Justice Rehnquist reemphasized that point throughout his Opinion by citing language from the

Miller case throughout (see pages 15 CrL 3244, 3246, 3247). The trial judge in the *Hamling* case instructed the jury in no less than 18 specific times that they must apply national standards, despite the fact that *Miller* v *California* was the law of the land, and indicated that national standards no longer applied, and the Supreme Court in *Hamling* reemphasized that rule.

In the case of *Jenkins* v *Georgia,* 41 L Ed 2d 642; 94 S Ct 2750 [1974] wherein Defendants were charged under the Georgia State Code for obscenity in the showing of the film, CARNAL KNOWLEDGE, Justice Rehnquist, in delivering the majority Opinion, again indicated that the Constitution does not require that juries be instructed in State obscenity cases to apply the standards of a hypothetical statewide community. He went on to say on page 157:

> "*Miller* approved the use of such instructions; it did not *mandate* their use. What *Miller* makes clear is that state juries need not be instructed to apply 'national standards.' "

He then stated:

> "We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.' *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the STATES have considerable latitude in framing STATUTES under this element of the *Miller* decision. A STATE may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller.*" (Emphasis added)

Justice Rehnquist then made clear that the *Miller* cases and the ones that have followed are adopting a rule which is designed to prohibit by State law "public portrayal of hard-code sexual conduct for its own sake and for ensuing commercial gain," (See page 161), which proposition follows from the statement by Justice Burger in *Miller* on page 26 wherein he said:

> "At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit First Amendment protection."

So neither of these cases assists the CITY OF EAST DETROIT in its prosecution, but, if anything, supports the Defendants in the legal proposition of *Miller* that:

1) Defendants in obscenity cases must be prosecuted under *applicable STATE law* as written or authoritatively construed, *Miller* v *California,* 413 US 15; and,

2) Local juries may apply a vague and sometimes questionable community standard of sexual conduct, but must do so under *applicable STATE law.*

Finally, the most difficult problem the CITY OF EAST DETROIT encounters as to their legal position is the frank admission by City Attorney Mihelich in oral argument on June 24, 1974, wherein on the Court's record he admitted that subsequent to the prosecution of these Defendants the CITY OF EAST DETROIT amended the Ordinance under which these Defendants were prosecuted and are being prosecuted to make it conform to the *Miller* opinion, which statement by the City Attorney is an acknowledgment that the Ordinance under which the Defendants were prosecuted did *not* conform to the *Miller* case; otherwise it would not have been necessary for the CITY OF EAST DETROIT to make such amendments.

Conclusions

1. If Respondents can be prosecuted under the decisions flowing from *Miller,* they must be prosecuted under an applicable STATE law, not an Ordinance adopted by the CITY OF EAST DETROIT.

2. At the time of the alleged offense on October 23, 1974, there was no "applicable STATE law" in Michigan under which Respondents could be prosecuted.

3. Even if under the cases cited heretofore the CITY OF EAST DETROIT had the power to adopt an Ordinance such as the one in question, the Ordinance itself is defective under the requirements of *Miller* and *Paris Adult Theatre I* in terms of the language and the test to be applied, in that:

(a) Nowhere in the test stated in the Ordinance Section 9.302 are the so-called three elements that must coalesce according to *Miller,* such as "appeals to a prurient interest in sex," "patently offensive," and "taken as a whole, does not have serious literary, artistic, political or scientific value."

(b) It is not "specifically defined by applicable STATE law."

(c) It prohibits showing of sexual intercourse although the case of *People* v *Danielac,* 38 Mich App 230, approves the same.

(d) It prohibits the depicting of less than completely or opaquely pubic region although the same was held to be not obscene in the case of THE LAST PICTURE SHOW, even when completely uncovered.

(e) It apparently prohibits or designates as obscene fondling a completely covered buttock.

(f) It prohibits less than completely and opaquely covered female breasts below a point immediately

above the top of the areola, although the same was deemed not obscene in THE LAST PICTURE SHOW. (*BBS Productions, Inc.* v. *Purcell,* 360 F. Supp. 801 (1973); *U.S.* v. *25,000 Magazines Entitled Revue,* 254 F. Supp. 1014 [1966]).

4. The EAST DETROIT City Attorney admitted on the record of oral argument that the Ordinance under which these Respondents were prosecuted did not comply with the *Miller* decision at the time of their prosecution, and it was necessary for the CITY OF EAST DETROIT to amend the Ordinance in an effort to seek such compliance.

QUESTION II

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THE SHOWING OF OBSCENE MOTION PICTURES CONSISTENT WITH THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN?

Trial Court Opinion — NO.

Respondents Contend — NO.

Michigan Court of Appeals — YES.

Michigan Supreme Court — NO.

ARGUMENT

This question has been answered in the negative in the preceding argument, in that the cases cited by Respondents indicate that a municipality does not have sufficient power and should not have such power.

It should be remembered that the governmental structure of the United States includes, in addition to the Federal Government and the fifty States, a total of 13,049 counties, 18,048 municipalities, and 17,015 townships (United States Bureau of the Census: Statistical Abstract of the United States, 1969, p 405).

If a film can be denied First Amendment protection because it does not meet the community standards of Oshkosh, or because it appeals to the prurient interest of the people in the City of Pine Bluff, the First Amendment is dead for all practical purposes, at least where material is challenged as obscene. In *United States* v *Klaw,* 350 F 2d 155 (2 Cir 1965), the Court recognized the serious threat to freedom of expression implicit in giving free rein to local communities to exclude from the First Amendment what they do not like (350 F 2d at 170):

> ". . . . While there is some merit to the opinion of those who say that appellate courts should not have to sit as a board of censors supervising the work of the police, the motion picture censorship bureaus, the schools, the churches and other organizations that have their lists of good and bad books and motion pictures, there is even more merit to the view that once these preferences are enforced upon others, we 'cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected' . . . Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity."

Finally, the New York Court of Appeals, in the case of *New York State* v *Buckley and Goldstein,* 352 N.Y.S. 2d 601 [1973], through Judge Gabrielli, state at page 608:

> "We take pains to declare that in determining whether any material is patently offensive or obscene, the community standard to be applied is a STATE standard." (Emphasis added)

As Judge Charles L. Levin, quoted in page 418 of *People* v *Bloss*, describing the judicial reaction to *Redrup* at that time:

> "I am in entire agreement with my colleagues that the seized magazines are vulgar, tawdry, and unpleasant. The question before us, however, is not whether these odious magazines are obscene in the ordinary sense of the word — they clearly are — but whether they are obscene in the constitutional sense. The phrase 'obscene in the constitutional sense' is a term of art coined by the United States Supreme Court and, to the extent it has defined that term, its definition is controlling upon us. Neither my personal opinion nor, I respectfully add, the opinions of my colleagues is relevant where there is a controlling opinion from the United States Supreme Court.
>
> "The United States Supreme Court has undertaken the exposition and control of the development of this area of the law. It has made it very clear that only in extraordinary cases will publications be deemed obscene in the constitutional sense."

In other words, the CITY OF EAST DETROIT begs the question by citation of a City Charter to give itself authority to adopt the Ordinance in question. As Justice Levin indicated, the United States Supreme Court controls as to the constitutionality of municipal Ordinances, and it is unquestioned law that any contravening of the Constitution is invalid and inoperative (*Gentzler* v. *Constantine Village Clerk*, 320 Mich 394, 1948).

QUESTION III

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THE SHOWING OF OBSCENE MOTION PICTURES PURSUANT TO ITS POLICE POWERS AS A HOME RULE CITY?

Trial Court Opinion — NO.

Respondents Contend — NO.

Michigan Court of Appeals — YES.

Michigan Supreme Court — NO.

ARGUMENT

Again, Respondents feel the prior argument controls on this question, and the answer is NO. The City attempts to beg the question again by a citation of its constitutional and statutory powers. It is interesting to note from the Burger Opinion in *Miller* that the Court makes no effort to deal with the question contained in the CITY OF EAST DETROIT Charter dealing with "all things detrimental to the health, morals, comfort, safety and welfare of the inhabitants," and it has not been clearly established by the *Miller* Opinion that regulation of pornography can be justified under such Charter provision. In fact, the contrary would appear to be true, wherein on pages 60 and 61 of the *Miller* Opinion Justice Burger admitted, "There is no conclusive proof of a connection between anti-social behavior and obscene material."

The Presidential Commission on Obscenity and Pornography has reported in the August 6, 1970, issue of the Los Angeles Times (Part 1, page 5):

> "Research indicates that erotic materials do not contribute to the development of character deficits, nor operate as a significant factor in antisocial behavior or in crime and delinquency causation."

There is no evidence, the Report concluded:

> "... that exposure to pornography operates as a cause of misconduct in either youths or adults."

Therefore, the City Ordinance cannot be justified on the Charter power since there has not been and could not be a showing that the items sought to be prohibited or regulated, to wit: obscene movies, are "detrimental to the health, morals, comfort, safety and welfare of the inhabitants of the CITY OF EAST DETROIT."

QUESTION IV

IS THE CITY OF EAST DETROIT'S OBSCENITY ORDINANCE, CHAPTER 129, TITLE IX, AS AMENDED BY SECTION 9.305A, EFFECTIVE JULY 16, 1973, UNCONSTITUTIONAL PURSUANT TO THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF MICHIGAN?

Trial Court Opinion — YES.

Respondents Contend — YES.

Michigan Court of Appeals — YES.

Michigan Supreme Court — YES.

ARGUMENT

Respondents believe they have established in the Arguments under the previous Questions that the Answer to this Question IV is and should be YES.

QUESTION V

DID THE CITY OF EAST DETROIT, UNDER ITS OBSCENITY ORDINANCE, CHAPTER 129, TITLE IX, AS AMENDED, VIOLATE RESPONDENT'S PROCEDURAL RIGHTS AS TO SEIZURE OF FILM AND TRIAL PROCEEDINGS?

Trial Court Opinion — NOT CONSIDERED.

Respondents Contend — YES.

Michigan Court of Appeals — NOT CONSIDERED.

Michigan Supreme Court — NOT CONSIDERED.

ARGUMENT

Respondents claim that the procedures taken under the Ordinance in the prosecution of these proceedings violated Respondents' constitutional rights, *in the event the EAST DETROIT Ordinance is legally valid.*

The Motion Picture Film, THE COLLEGIATES, was illegally seized and illegally retained by the EAST DETROIT police. In the case of *Marcus* v *Search Warrant of Property,* 367 US 717; 6 L Ed 2d 1127; 81 S Ct 1708 [1961], the Court held that a Warrant for the seizure of allegedly obscene books could not be issued on the conclusory opinion of a police officer that the books sought to be seized were obscene. "The warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene . . ." (pages 731-732) and there had been no step in the procedure before seizure designed to "focus searchingly on the question of obscenity" (page 732).

In the case of *Lee Art Theatre* v *Virginia,* 392 US 636; 20 L Ed 2d 1313; 88 S Ct 2103 [1968], the Court held that the warrant was issued on the basis of a police officer's affidavit giving the titles of the film and asserting in a conclusory fashion that he had personally viewed the films and considered them obscene. The Court reversed the Petitioner's conviction because, "The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity.' " (*Marcus* at page 732)

> "Seizing a film, then being exhibited to the general public, presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitous action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards." (*Stanford* v *Texas,* 379 US 476 [1965]; 13 CrL 3246).

The Court held in *Roaden* v *Kentucky,* 413 US 496; 37 L Ed 2d 757; 93 S Ct 2796 [1973], wherein Chief Justice Brennan delivered the majority opinion and stated:

> "Moreover, ordinary human experience should teach that the seizure of a movie film from a commercial theatre with regularly scheduled performances, where a film is being played and replayed to paid audiences, presents a very different situation from that in which contraband is changing hands or where a robbery or assault is being perpetrated. In the latter settings, the probable cause for an arrest might justify the seizure of weapons or other evidence or instruments of crime, without a warrant."

In *Roaden,* the seizure was upon the police officer's conclusion that the film was obscene without obtaining a warrant. However, it is Respondents' contention that the alleged Affidavit signed by Det/Sgt Durning again states "his opinion" that the motion picture was obscene, lewd, lascivious, filthy and indecent, which are all conclusory assertions. In fact, the search warrant itself merely states, "THE COLLEGIATES, 'which was obscene in nature.' " There is nothing in the warrant issued by the Judge, nor the Affidavit signed by Det/Sgt Durning, in accordance with the three-pronged test as recited by *Miller* v *California.* As Chief Justice Burger said in *Roaden,* at page 506:

> "If, as *Marcus* and *Lee Art Theatre* held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, a *fortiori,* the officer may not make such a seizure with no warrant at all. 'The use by the government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. . . The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.'
>
> "In this case, as in *Lee Art Theatre,* the admission of the film in evidence requires reversal of petitioner's conviction."

It is the contention of Respondents that the case of *Heller* v *State of New York,* 413 US 483; 37 L Ed 2d 745; 93 S Ct 2789 [1973], decided by the United States Supreme Court on June 25, 1973, the same day as *Roaden,* does not apply to the case at issue since in that case, although a search warrant was duly issued by the Court, as Chief Justice Burger pointed out in the majority opinion, the distinct difference in *Heller* is that after three police officers observed the film called BLUE MOVIE, the Judge who is-

sued the search warrant accompanied a police officer, purchased a ticket and saw the entire film. Chief Justice Burger stated at page 488:

> ". . . he had a full opportunity for independent judicial determination of probable cause prior to issuing the warrant, and that he was able to 'focus searchingly on the question of obscenity.' " (page 13 CrL 3241)

Chief Justice Burger continued on page 492:

> "In addition, on a showing to the trial court that other copies of the film are now available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned."

The Affidavit for a search warrant and the search warrant itself violates the terms of the CITY OF EAST DETROIT Ordinance Section 9.302, in that the test to be applied, according to said Ordinance, in part, states:

> ". . . The book, picture, or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only . . ."

and Det/Sgt Durning, to support his Affidavit, details explicit detached and separate portions, as indicated in paragraphs 3, 4, 5 and 6 of his Affidavit.

Despite numerous requests by defense counsel and cooperating even to the degree of allowing Respondents' theatre to be used for showing of the film to the Judge in the course of the trial, the CITY OF EAST DETROIT still refused to return the film, THE COLLEGIATES. No one could characterize the illegality of the proceedings more than Det/Sgt Durning, who, on top of the police report, has entitled, "Raid: Capri Theatre."

There are numerous defects in the proceedings themselves, for example:

1. The Municipal Judge's return by Martin Smith dated the 15th day of April, 1974, does not specify the crime alleged to have occurred, but it is conclusory by simply saying, "Displaying an obscene motion picture, THE COLLEGIATES."
2. The Complaint signed by Det/Sgt Durning is likewise conclusory.
3. The Judge's return stated, "Upon a jury trial held on the 9th day of March," is defective in describing the proceedings in that Respondents waived a jury trial and the trial was held by the Court.
4. A return of the original search warrant and affidavit had not been filed with the Court.
5. The Magistrate's return on LININGTON states that Martin Smith issued the warrant, but the name Calvin Rock appears thereon.
6. In addition, the return on LININGTON appears that it does not have an original signature, but a rubber stamp of the Judge Calvin Rock as do many of the other documents in the file.

The Trial

Although the trial was brief before Martin Smith, since Respondents were attacking the constitutional validity of the Ordinance, it appears as Respondents argue that 1) Judge Smith did not follow the tests applied in *Miller* and *Paris Adult Theatre I,* in finding the Respondents guilty. In the event that he had followed such tests, he would have found the Respondents not guilty and the Ordinance of the CITY OF EAST DETROIT unenforceable; 2) Judge Smith, in addition, failed or refused to follow the require-

ments of his own Ordinance in applying the tests required by said Ordinance, in that it requires applying "standards of common conscience of the community"; 3) the trial for THE COLLEGIATES was held on the morning of April 9 by the Court. A jury trial was held on the same day for the film THE DEVIL IN MISS JONES which, according to a number of cases previously cited by Respondents, was found to be obscene and contained the explicit scenes detailed in Det/Sgt Durring's Affidavit in support of the search warrant in paragraphs 3, 4, 5 and 6 therein, and yet, the East Detroit jury, which is supposed to be the conscience of the community, found the Defendants who exhibited THE DEVIL IN MISS JONES not guilty.

Conclusions

It is the contention of Respondents that they have been deprived of due process by virtue of the aforesaid procedural violations as to illegal seizure of the film in question, improper proceedings, the numerous defects recited in the proceedings themselves, and the failure of the trial judge to apply the tests required in the *Miller* and *Paris Adult Theatre I* cases, and finding the Respondents guilty.

LEGAL DEVELOPMENTS SUBSEQUENT TO CIRCUIT COURT RULING

The developments in the law as enunciated by the United States Supreme Court and the Michigan Supreme Court since the original ruling by the Circuit Court offer even less support to Petitioner. For example, in *Lewis* v *New Orleans,* 415 US 130; 39 L Ed 2d 214; 94 S Ct [1974], the City ordinance making it unlawful to use obscene language to a police officer was declared unconstitutional in violation of the First and Fourteenth Amendments because the City ordinance was facially overbroad.

In addition, a Jacksonville City ordinance, which sought to prohibit drive-in theaters from showing movies containing any nudity, was described to be facially invalid as an infringement on First Amendment Rights. *Erznoznik* v *City of Jacksonville,* 422 US 205; 45 L Ed 2d 125; 95 S Ct 2268 [1975]. It is interesting to note that in the opinion by Justice Powell, a recitation of the ordinance is strikingly similar to the "prohibited parts" of the human body as appears in the East Detroit ordinance. The Jacksonville ordinance prohibits the showing of ". . . the human male or female bare buttocks, human female bare breasts, or human bare pubic areas . . ." Compare this language to the language of the East Detroit ordinance appearing on page two of the Respondents' brief herein.

Another striking similarity is that as Justice Powell says, under Roman Numeral II of his opinion on page 208:

> "Appellee concedes that its ordinance sweeps far beyond the permissible restraints on obscenity, see *Miller* v *California,* 413 U.S. 15 (1973), and thus applies to films that are protected by the First Amendment."

Erznoznik v *City of Jacksonville, supra.*

In oral argument, the East Detroit City Attorney admitted that the ordinance did not comply with *Miller* and that East Detroit subsequently amended the ordinance to comply.

As Respondents argue in this case, Justice Powell recites in *Erznoznik, supra,* at page 209:

> ". . . when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." "Such selective restrictions have been upheld only when the speaker intrudes on the privacy of

the home, . . ." Continuing, "The Jacksonville ordinance discriminates among movies solely on the basis of content."

And later, as Respondents further argued with reference to the invalidity of the ordinance, in *Erznoznik, supra,* Justice Powell stated at page 213:

> "Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous." "Clearly all nudity cannot be deemed obscene even as to minors."

In conclusion, Justice Powell states at page 217:

> "Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential. These prerequisites are absent here."

And finally, in the rehearing by the Michigan Supreme Court, of the *Bloss* case, the Court said PER CURIAM,

> "We are persuaded that defendant's conviction cannot stand for the reason that at the time he did the act complained of this Court had not construed the obscenity statute (as permitted in *Miller*) to proscribe such conduct."

and reversed the conviction and discharged the Defendant. *People* v *Bloss,* 394 Mich 79 [1975].

Only when a precise, objective, clear definition of obscenity is drawn will cases, such as this one, no longer form a part of the Appellate Court's questioned decisions. However, the very subjective nature of obscenity seems to preclude that possibility.

CONCLUSION

I. The Preliminary Injunctive Order entered on the 21st day of November, 1975, by the Honorable Edward J. Gallagher, provided among other things, that the City of East Detroit would be enjoined from execution of violation complaints, arrests, and confiscation of films pursuant to the provisions of said Ordinance until such time as *this Honorable Court, the Michigan Court of Appeals or the Michigan Supreme Court,* alters, amends or reverses the Order of the trial judge entered on the 9th day of December, 1974, in which the criminal proceedings under the alleged East Detroit Obscenity Ordinance were quashed.

II. It is a matter of public record the Michigan Court of Appeals, in a decision released on May 27, 1976, in an appeal from the criminal enforcement of the Ordinance *affirmed Judge Gallagher* and therefore, the Order dated the 9th day of December, 1974, having been affirmed, *has not* been altered, amended or reversed.

III. That said decision by the Court of Appeals is presently on appeal to the Michigan Supreme Court for clarification on the issue of a municipality's power to enact ordinances of this type and kind.

IV. That the City of East Detroit, despite the appeals in this case and the Injunctive Order, continues to harass the Petitioner by an indirect manner, the latest of which acts is the refusal to issue routinely a business license to said Theatre and the reasons given therefore: 'Because of continued violations of the Ordinance (the Obscenity Ordinance) which is being questioned on appeal. (Newspaper article follows):

Court battle goes on;
so do x-rated flicks

By BOB CAMPBELL
Macomb Daily Staff Writer

EAST DETROIT — Macomb County Circuit Judge Edward J. Gallagher Monday refused to order the city to issue a license to the Capri Theatre, one of two adult theaters in the city embroiled in a still simmering legal battle.

Gallagher said that since the Michigan Court of Appeals had already entered the litigation case between the city and theatre that he no longer had jurisdiction.

The appeals court recently upheld Gallagher's decision voiding the Municipal Court conviction of the theater for showing the movie "The Collegiates" in 1973.

Robert S. McKenzie, attorney for Capri owner Robert Vickrey, said that the license denial constituted enforcement of the obscenity ordinance that the city is now enjoined from enforcing under a November, 1975 order from Gallagher.

Two weeks ago Joseph Mihelich, representing the city, had asked Gallagher to lift the injunction so that the city could begin enforcing the ordinance.

Though the appeals court found the ordinance under which the city had prosecuted the Capri unconstitutional it also ruled that local governments do have a right to adopt and enforce pornography laws that meet requirements laid out by the U.S. Supreme Court.

(Continued on Page 3-A)

Court battle goes on

(Continued from Page 1-A)

Since that prosecution the city has enacted a new less vague, less far-reaching ordinance.

Gallagher said two weeks ago that for the same reason he gave Monday — lack of jurisdiction — he could not lift the restraining order.

Now the city is denying the Capri a license for several reasons, foremost of which is the Capri's continued showing of "hard-core" pornographic films.

In court Monday however, Lee Taut, who is working with Mihelich on the case, said that the Capri had not made a written license application and also violated a licensing regulation adopted in 1973 that prohibits an adult theater from operating within 1,000 feet of a public building.

The East Detroit Post Office is across the street from the Capri. Mihelich said the ordinance was originally aimed at preventing the licensing of the Stage Theatre which opened an x-rated house on Gratiot directly across the street from City Hall.

But City Manager W. Larry Collins and administrative assistant Leonard Tropea both told The Macomb Daily Monday that the license denial was made because the case involving the pornography ordinance was still pending in court.

Collins, in fact, said he was not aware of the licensing ordinance mentioned by Taut.

Tropea, who handles licensing of city businesses, said Mihelich told him "due to the thing pending" not to mail an application for a license — as has been done for nearly 15 years each spring with the Capri.

Mihelich, when questioned later, said that the continued violation of the ordinance was part of the reason for the license denial.

"The city does not want to be placed in a position of voluntarily giving a license when the Capri is still showing pornographic movies in violation of the city obscenity ordinance," he said.

But even though the Capri and the Stage, which has never had a license, are now operating without licenses, Mihelich said the theaters will be left alone until the injunction is lifted.

The appeals court will be asked to remove Gallagher's order later this week, Mihelich said. That could take from two to six weeks.

— Macomb Daily 6/22/76

V. The City of East Detroit has failed to show on appeal or in its brief that the Injunctive Order interferes with the maintenance of the public health, safety and morals of the citizenry of East Detroit and in fact, by the City's acts through its attorneys and agents, exhibits cogent reasons for the continuance of the Injunctive Order issued by the trial court on the 21st day of November, 1975.

VI. Petitioner, therefore, respectfully suggests that the City has failed to show that it has the power to adopt said obscenity ordinance; has failed to show good and sufficient reason for dissolution of Judge Gallagher's Injunctive Order issued on the 21st day of November, 1975; and has failed to show sufficient and adequate justification for an appeal on dissolution of said Injunctive Order without a hearing on the merits before the Honorable Edward J. Gallagher.

It is interesting to note that on May 22, 1976, Justice William J. Brennan, Jr., of the United States Supreme Court, in an address to the New Jersey Bar Association said:

> "Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism."

In Michigan, Justice Brennan's comments should weigh even more heavily since the relevant section of the Federal First Amendment provides:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

While in contrast, the Michigan Constitution provides:

> "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."

In an excellent article on the subject in the Michigan State Bar Journal, December, 1975, by John M. Burkoff and Victor T. Adamo, on page 969, the authors indicated:

> "But the Michigan provision's language (purposely, as we will later see) goes beyond the thrust of the First Amendment in its first clause as it expressly reserves free speech rights for all persons on all subjects.
>
> "The difference in language — telling legislatures what they cannot do as contrasted with telling the people what they can do — is of obvious significance when placed in historical context."

The authors came to this conclusion:

> "That the scope of protected speech in Michigan is very broad indeed — far broader than the current notion of the breadth of federally protected speech."

Petitioners are forced to agree with the authors wherein on page 973 they stated:

> "Not only are the states free to set sail on their own course in regulating obscenity within the minimum Federal constitutional protections; reason and responsibility compel them to do so. In Michigan, although the recent Bloss #2 decision failed to come to analytical grips with the significant questions that must eventually be answered, the opinion does stand as an indication the Michigan Court is aware that the obscenity problem in this state must be approached in the con-

text of the expansively written free expression provision in the Michigan Constitution."

PREEMPTION

Finally, it is interesting to note that the regular session of the 1977 Michigan State Legislature adopted a statute dealing with "Child porongraphy" being MCLA §750.-145C; PA 301, 1977, a copy of which is incorporated herein:

PENAL CODE—CHILD ABUSIVE COMMERCIAL ACTIVITY

PUBLIC ACT NO. 301

HOUSE BILL No. 4332

AN ACT to amend Act No. 328 of the Public Acts of 1931, entitled "An act to revise, consolidate, codify and add to the statutes relating to crimes; to define crimes and prescribe the penalties therefor; to provide for the competency of evidence at the trial of persons accused of crime; to provide immunity from prosecution for certain witnesses appearing at such trials; and to repeal certain acts and parts of acts inconsistent with or contravening any of the provisions of this act," as amended, being sections 750.1 to 750.568 of the Compiled Laws of 1970, by adding section 145c.

The People of the State of Michigan enact:

Section 1. Act No. 328 of the Public Acts of 1931, as amended, being sections 750.1 to 750.568 of the Compiled Laws of 1970, is amended by adding section 145c to read as follows:

M.C.L.A. § 750.145c

Sec. 145c. (1) As used in this section:

(a) "Child" means a person who is less than 18 years of age, is not emancipated by operation of law

as provided in section 4(1) of Act No. 293 of the Public Acts of 1968, as amended, being section 722.4 of the Michigan Compiled Laws.

(b) "Commercial purpose" means any purpose for which monetary gain or other remuneration could reasonably be expected or anticipated, or has already been received or arranged for. Commercial purpose shall not be construed to mean processing. However, processing may be used, where applicable, to demonstrate the ultimate sale, distribution, showing, rental, lease, or use for remuneration was intended. "Processing", as used in this subdivision, means photographing, filming, or sound record, or the reproducing, copying, or printing of a photograph, film, slide, electronic visual image or sound recording.

(c) "Erotic fondling" means touching a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breasts, or if the person is a child, the developing or undeveloped breast area, for the purpose of, real or simulated overt sexual gratification or stimulation of 1 or more of the persons involved. Erotic fondling shall not be construed to include physical contact, even if affectionate, which is not for the purpose of, real or simulated, overt sexual gratification or stimulation of 1 or more of the persons involved.

(d) "Erotic nudity" means the display of the human male or female genital or pubic area, or developed or developing female breast, in a manner which lacks primary literary, artistic, educational, political, or scientific value and which the average person applying contemporary community standards would find appeals to prurient interests. As used in the subdivision, "community" means the state of Michigan.

(e) "Financing" means the furnishing of funds or capital for a commercial purpose. Financing shall not be construed to mean the simple purchase or rental of a material or activity after it is created or produced.

(f) "Listed sexual act" means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.

(g) "Masturbation means the real or simulated touching, rubbing, or otherwise stimulating a person's own clothed or unclothed genitals, pubic area, buttocks, or,

Substantive changes in text indicated by underline

if the person is female, breasts, or if the person is a child, the developing or undeveloped breast area, either by manual manipulation or self-induced or with an artificial instrument, for the purpose of, real or simulated, overt sexual gratification or arousal of the person.

(h) "Passive sexual involvement" means an act, real or simulated, which exposes another person to or draws another person's attention to an act of sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity because of viewing any of these acts or because of the proximity of the act to that person, for the purpose of, real or simulated, overt sexual gratification or stimulation of 1 or more of the persons involved.

(i) "Child abusive commercial activity" means a child engaging in a listed sexual act which was or is for a commercial purpose.

(j) "Child abusive commercial material" means a developed or undeveloped photograph, film, slide, electronic visual image or sound recording of a child engaging in a listed sexual act, or any reproduction, copy, or print of such a photograph, film, slide, or sound recording, which was or is for a commercial purpose.

(k) "Sadomasochistic abuse" means either of the following:

(i) Flagellation or torture, real or simulated, for the purpose of real or simulated sexual stimulation or gratification, by or upon a person.

(ii) The condition, real or simulated, of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person.

(l) "Sexual excitement" means the condition, real or simulated, of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

(m) "Sexual intercourse" means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between a human and an animal, or with an artificial genital.

(2) A person who causes or knowingly allows a child to engage in a child abusive commercial activity, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make or finance any child abusive commercial activity or child abusive commercial material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $20,000, or both, if both of the following occur:

(a) That person knows, has reason to know, or should reasonably be expected to know that the child is a child, or that person has not taken reasonable precautions to determine the age of the child.

(b) That person knows, has reason to know, should reasonably be expected to know, or intends that the child abusive commercial activity or child abusive commercial material is or was for a commercial purpose.

(3) A person who commercially distributed or promotes, or finances the distribution or promotion of, or

receives for the purpose of commercially distributing or promoting, or conspires, attempts, or prepares to so distribute, receive, finance, or promote any child abusive commercial material or child abusive commercial activity is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $10,000, or both, if both of the following occur:

(a) That person knows, has reason to know, or should reasonably be expected to know that the child is a child.

(b) That person knows, has reason to know, should reasonably be expected to know, or intends that the prohibited commercial activity or child abusive commercial material is or was for a commercial purpose.

(4) Expert testimony as to the age of the child used in a child abusive commercial material or a child abusive commercial activity shall be admissible as evidence in court and may be a legitimate basis for determination of age, if age has not otherwise been proven.

deletions by asterisks * * *

(5) This section shall be applicable and uniform throughout the state and all political subdivisions and municipalities in the state.

(6) A local municipality or political subdivision shall not enact ordinances, nor enforce existing ordinances, rules, or regulations governing child abusive commercial activity or child abusive commercial material as defined by this section.

Approved Dec. 31, 1977.

It is to be noted that this Act is the only valid Statute in Michigan dealing with pornography and as illustrative of the State Legislature's intent in maintaining uniformity and preempting the field, the Court's attention is directed to sub-sections 5 and 6 in which the Legislature expresses that the material be uniform throughout the State and

expressly prohibits municipalities from enacting ordinances or enforcing existing ordinances, rules or regulations governing the subject.

It would seem from this action, that the Legislature has expressed a clear intention to preempt the law of regulation of pornography.

RELIEF REQUESTED

For the reasons cited herein, the Respondents respectively request that this Honorable Court deny Petitioner's Writ of Certiorari to the Supreme Court of the State of Michigan with costs and attorney fees taxed in favor of the Respondents hereon.

Respectfully submitted,

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